

IN THE ARBITRATION UNDER CHAPTER 11
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND UNDER THE UNCITRAL ARBITRATION RULES
BETWEEN

- - - - - -x
:
METHANEX CORPORATION, :
:
 Claimant/Investor, :
:
 and :
:
UNITED STATES OF AMERICA, :
:
 Respondent/Party. :
:
- - - - - -x Volume 9

Thursday, June 17, 2004

The World Bank
1818 H Street, N.W.
MC Building
Conference Room 13-121
Washington, D.C.

The hearing in the above-entitled matter
came on, pursuant to notice, at 2:30 p.m. before:

V.V. VEEDER, Q.C., President

PROF. W. MICHAEL REISMAN, Arbitrator

J. WILLIAM ROWLEY, Q.C., Arbitrator

Also Present:

SAMUEL WORDSWORTH,
Tribunal Legal Secretary

MARGRETE STEVENS,
Senior ICSID Counsel
Tribunal Administrative Secretary

Court Reporter:

DAVID A. KASDAN, RDR-CRR
Miller Reporting Company, Inc.
735 8th Street, S.E.
Washington, D.C. 20003
(202) 546-6666

APPEARANCES:

On behalf of the Claimant/Investor:

CHRISTOPHER F. DUGAN, ESQ.
CLAUDIA CALLAWAY, ESQ.
ALEXANDER W. KOFF, ESQ.
SABRINA ROSE SMITH, ESQ.
MATTHEW S. DUNNE, ESQ.
Paul Hastings Janofsky & Walker, L.L.P.
10th Floor
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2400
(202) 508-9500
alexanderkoff@paulhastings.com

APPEARANCES: (Continued)

On behalf of the Respondent/Party:

WILLIAM H. TAFT, IV, ESQ.

Legal Adviser

RONALD J. BETTAUER, ESQ.

Deputy Legal Adviser

MARK A. CLODFELTER, ESQ.

Assistant Legal Adviser for International
Claims and Investment Disputes

BARTON LEGUM, ESQ.

Chief, NAFTA Arbitration Division, Office
of International Claims and Investment
Disputes

ANDREA J. MENAKER, ESQ.

DAVID A. PAWLAK, ESQ.

JENNIFER I. TOOLE, ESQ.

CARRIELYN GUYMON, ESQ.

MARK S. McNEILL, ESQ.

Attorney-Advisers, Office of
International Claims and Investment
Disputes

Office of the Legal Adviser

U.S. Department of State

Suite 203, South Building

2430 E Street, N.W.

Washington, D.C. 20037-2800

(202) 776-8443

legumbc@state.gov

C O N T E N T S

	PAGE
CLOSING ARGUMENT	
For the United States: Mr. Bettauer	2024
Mr. Legum	2030
Mr. Pawlak	2057
Ms. Menaker	2068
Mr. Legum	2096
Mr. McNeill	2097
Ms. Menaker	2129
Mr. Legum	2138
Ms. Guymon	2145
Ms. Menaker	2162
Ms. Toole	2164
Mr. Bettauer	2177

1 P R O C E E D I N G S

2 PRESIDENT VEEDER: Good afternoon, ladies
3 and gentlemen. We now start day nine, the final
4 day of this hearing, and we give the floor to the
5 United States for its oral submissions in reply.

6 CLOSING ARGUMENT ON BEHALF OF RESPONDENT/PARTY

7 MR. BETTAUER: Thank you, Mr. President.

8 Mr. President, members of the Tribunal, I
9 will introduce the U.S. closing.

10 This has been a long and exhausting
11 hearing, and we appreciate the Tribunal's attention
12 during the past eight days and this opportunity to
13 address you today. Let me begin with two
14 fundamental points.

15 First, it is up to the claimant how to
16 plead its case; and second, each party has the
17 burden of proving the facts that supports its
18 claims for defense.

19 Let us look first at how the claimant has
20 pleaded its case. Methanex pleaded an expansive
21 case. It includes elements as diverse and complex

1 as the global methanol market, the science of
2 groundwater contamination in California, the market
3 for oxygenate fuel additives, the system for
4 financing electoral campaigns in the United States,
5 and Federal and state regulation of the components
6 of automobile fuel, and the effects of that
7 regulation on air and water pollution. These more
8 exotic elements were, in addition to the familiar
9 ones in investor-state arbitration, such as the
10 existence of investments, breach, and loss.

11 So, that is how the case has been pleaded.

12 The second point is burden of proof.

13 Methanex, under Article 24 of the UNCITRAL Rules,
14 has the burden of proving the case that it pleaded.
15 Considering what it pled, Methanex undertook a
16 monumental task. As the United States demonstrated
17 in its rejoinder, and again last week on Tuesday
18 and Wednesday, the results of Methanex's efforts
19 have, indeed, been monumental, but monumental only
20 in failure. Rather than offer credible, competent
21 evidence on these diverse topics, Methanex largely

1 offered newspaper articles, hearsay statements,
2 speculation, and post hoc criticisms of the science
3 underlying California's MTBE ban. The evidence
4 Methanex did offer did not even establish prima
5 facie the wide-ranging propositions that it
6 asserted. The evidence it submitted did not come
7 close to discharging its burden of proof.

8 Methanex as much as admitted this
9 yesterday when it admitted that there were
10 significant evidentiary difficulties in its case.
11 So, Methanex presented the Tribunal with conjecture
12 and asks the Tribunal to draw inferences, but the
13 claimant's burden of proof cannot be met in this
14 manner.

15 The purpose of the evidentiary portion of
16 this hearing, of course, was not to introduce new
17 evidence. It was to provide an opportunity for
18 each party to test the written testimony presented
19 by the other. The United States determined that it
20 would not be a productive use of the hearing time
21 to test evidence that was patently and

1 irretrievably deficient. As we said before, we
2 decided not to cross-examine Methanex's witnesses
3 because there was no need to do so. We had already
4 challenged that testimony through our witnesses and
5 in our pleadings and shown their testimony to be
6 deficient.

7 Methanex, by contrast, determined that it
8 wished to test all but two of the witnesses offered
9 by the United States, but one would not expect that
10 Methanex could, through that examination, repair
11 the gaping holes in its case. The testimony we
12 heard on Thursday, Friday, and Monday only
13 confirmed that conclusion. Each of the witnesses
14 proved to be credible and forthcoming under
15 examination. The testimony each witness presented
16 was in accord with his or her written statement.
17 The evidentiary record supporting dismissal has
18 only strengthened during the course of this
19 hearing.

20 Now, let me outline for you how we will
21 proceed in our closing. As with our opening, the

1 United States will again divide its presentation
2 into parts. Mr. Legum will address Methanex's
3 contentions based on the conditional prohibition of
4 methanol and 10 other compounds. We will also
5 address the latest iteration of Methanex's claim
6 that the ban of MTBE was intended to harm methanol
7 producers.

8 Next, Mr. Pawlak will respond to
9 Methanex's contentions based on scientific
10 evidence. He will show that Methanex has misstated
11 key points that were established by U.S. witnesses.

12 Then Ms. Menaker will address Methanex's
13 assertion that the MTBE ban was intended to provide
14 a gift to ethanol producers rather than address
15 groundwater contamination. She will show that
16 Methanex's conspiratorial inferences concerning
17 ethanol and Governor Davis have no support in the
18 record.

19 Mr. Legum will then briefly address
20 Methanex's points on proximate causation.

21 Mr. McNeill will review Methanex's failure

1 to establish the fact of any loss or damage, as
2 required by Articles 1116 and 11. Then we will
3 respond on each of Methanex's substantive claims
4 and show why the arguments made yesterday have no
5 merit. Ms. Menaker will address the 1102 claim.
6 Ms. Guymon will address the 1105(1) claim.
7 Ms. Menaker will then return to address the 1110
8 claim.

9 Ms. Toole will briefly address the
10 authority for requiring that Methanex be held to
11 its burden of proving ownership of investments in
12 the United States by appropriate evidence,
13 something it has not done.

14 And finally, I will close our
15 presentation.

16 Now, Mr. President, I ask that you give
17 the floor to Mr. Legum.

18 PRESIDENT VEEDER: Mr. Bettauer, before we
19 do this, please ensure that you take convenient
20 breaks during the afternoon for the stenographers.
21 We leave it to you and your colleagues to indicate

1 when that will be convenient, so please bear that
2 in mind. I think we may need two breaks.

3 And are we on schedule to finish your
4 summations by 6:45?

5 MR. BETTAUER: I think we will be on time.

6 PRESIDENT VEEDER: Thank you very much.
7 Mr. Legum, the floor is yours.

8 MR. LEGUM: Thank you, Mr. President.

9 This afternoon, I will be addressing three
10 topics. First, the June 13, 2004 assertion by
11 Methanex that the conditional prohibition of
12 methanol and 10 other compounds is a measure for
13 purposes of this arbitration. Second, Methanex's
14 contentions yesterday concerning an intent to harm
15 methanol producers through the ban of MTBE. And
16 finally, I will show the record confirms that the
17 measures at issue do not relate to Methanex.

18 My first topic: The June 13, 2003 letter.
19 Here again, I have three points. First, this is
20 plainly a new claim, never before advanced as such
21 until this past weekend. Second, it is a claim

1 that is plainly barred by the First Partial Award.
2 And third, it is an utterly arid academic argument
3 because it is conceded that this conditional
4 prohibition had no effect whatsoever on methanol
5 producers.

6 The first thing I would like to do is set
7 the record straight as to the state of the
8 pleadings with respect to this new claim. Now,
9 yesterday Methanex erroneously stated that in its
10 February 2001 Amended Statement of Claim--that was
11 the one that was entitled "Draft Amended Statement
12 of Claim"--the conditional prohibition was
13 identified as a measure on which its claim was
14 based. If I could have my first slide here,
15 please. I will pause for a moment while these are
16 distributed to you.

17 Or shall we proceed?

18 All right. This is the statement that
19 appeared in the February 2001 Amended Statement of
20 Claim. The conditional prohibition, as can you
21 see, was mentioned in passing in that document, and

1 if I could have the next slide, please. In a
2 footnote, that document noted that the prohibition
3 extended to other alcohols. However, and this is
4 the third slide, the Amended Statement of Claim
5 never again mentioned the conditional prohibition
6 of methanol, and the Amended Statement of Claim, in
7 part four, specifically identified, quote, the U.S.
8 measures that violate NAFTA Articles 1102, 1105,
9 and 1110. And as the Tribunal can see, those
10 measures were the ban on MTBE stated in the 1999
11 Executive Order, and the implementing regulations,
12 a provision of the Executive Order that Methanex
13 asserted required gasoline pumps containing MTBE to
14 be labeled and implementing regulations for that.
15 And then finally, a provision of the California
16 Executive Order that required studies of whether
17 in-state methanol industry can be banned.

18 So, here is the section that specifically
19 identifies what measures were alleged to have
20 violated the NAFTA in the Amended Statement of
21 Claim. The conditional prohibition does not appear

1 here, although, as I mentioned, it was briefly
2 alluded to earlier on in that document.

3 In the Second Amended Statement of
4 Claim--this is Methanex's fresh pleading.

5 PRESIDENT VEEDER: Just to help us, I'm
6 sorry, the First Amended Statement of Claim was
7 also what we called the Draft Statement of Claim?

8 MR. LEGUM: Correct.

9 PRESIDENT VEEDER: Thank you.

10 MR. LEGUM: The Second Amended Statement
11 of Claim, this is the November 2002 fresh pleading,
12 also contained a passing reference to the
13 conditional prohibition in paragraph 22. This is
14 the text that Methanex focused on yesterday.

15 Now, this time the reference appeared in a
16 section of the pleading entitled "The Challenged
17 Measures." In response to that, in March of 2003,
18 the United States submitted its Supplemental
19 Statement of Defense, and you can see from the
20 screen that the United States, therefore, objected
21 to this as a new claim, but noted--and this is the

1 underlying text at the bottom--noted that it was
2 not clear from the fresh pleading whether Methanex
3 based a claim on this measure or whether it merely
4 cited it as evidentiary support.

5 The next document in the series was
6 Methanex's response to the U.S. Supplemental
7 Statement of Defense that's dated March 26, 2003.
8 And as can you see from the screen, Methanex
9 clarified that it was only relying on the
10 conditional prohibition as evidence. It stated,
11 Methanex's assertion that California banned
12 methanol as well as MTBE in 1999 to 2000 is not a
13 new claim. Rather, the methanol ban is specific
14 and compelling evidence, and that's emphasis in the
15 original, that California intended to harm all
16 methanol producers, including Methanex, by
17 excluding them from the California oxygenate
18 market.

19 PRESIDENT VEEDER: Again, I'm sorry, just
20 to get the reference right, is this the reply, when
21 you say response?

1 MR. LEGUM: What happened was, shortly
2 before the March 31, 2003 proceeding--

3 PRESIDENT VEEDER: I got it, I've got it.

4 MR. LEGUM: The next pleading was the U.S.
5 Amended Statement of Defense, and out of--that's
6 the December 2003 U.S. fresh pleading. Out of what
7 at the time seemed like an excess of caution, the
8 U.S. restated its objection to jurisdiction to the
9 extent that Methanex asserted a new claim based on
10 the conditional prohibition.

11 In Methanex's reply--and this is my next
12 slide--Methanex noted in response that--this is the
13 heading of that section of their reply--Methanex
14 added no new claims in its Second Amended Claim.
15 And then in the request for relief in the reply,
16 there was a single paragraph, and that single
17 paragraph referred only to the California MTBE ban.

18 In response, the U.S., in its April 2004
19 rejoinder--this is my next slide--noted that its
20 new jurisdictional objection had been rendered moot
21 since there was, as Methanex asserted in its reply,

1 no new claim being asserted based on that measure.
2 And moot that jurisdictional objection remained
3 until a couple of days ago.

4 To sum up, Methanex, before the First
5 Partial Award, never identified the conditional
6 prohibition of methanol as a measure for purposes
7 of Article 1101. It relied on the conditional
8 prohibition as evidence relevant to intent. It
9 included a vague reference to the conditional
10 prohibition in its fresh pleading. The United
11 States objected to this new claim, to the extent
12 that one was asserted. Methanex immediately
13 clarified that it was not asserting any new claim,
14 and so it remained until literally the middle of
15 this hearing.

16 Which brings me to my next point: It is
17 far too late to add a new claim in these
18 proceedings. First, the Tribunal lacks
19 jurisdiction over this claim. It is undisputed
20 that none of the jurisdictional prerequisites have
21 been met for the Tribunal to assert jurisdiction

1 with respect to this measure, as Methanex conceded
2 in response to a question from Mr. Rowley
3 yesterday, and the transcript reference is 1796 to
4 97.

5 As the President noted yesterday, Article
6 20 of the UNCITRAL rules does not permit amendments
7 where the amendment would be outside of the
8 Tribunal's jurisdiction. There is no authority to
9 allow an amendment here. Moreover, the First
10 Partial Award precludes any such new claim and
11 precludes it on two grounds.

12 First--and this is my next slide--the
13 Award expressly forbade Methanex from making any
14 new claim or exceeding the limits of its
15 then-existing case. This ruling was incorporated
16 into the operative part of the Award. The Award
17 thus found, in terms that are final and binding,
18 that discretionary grounds for allowing a new
19 amendment were not present.

20 Second, the Award made clear that the
21 Tribunal was well aware of the conditional

1 prohibition and its assertion in the February 2001
2 Amended Statement of Claim.

3 My next slide is paragraph 66 of the First
4 Partial Award, where the Tribunal expressly
5 referred to the conditional prohibition. The
6 conditional prohibition, therefore, was part of the
7 operative facts that the Tribunal assumed to be
8 correct for purposes of its award. The Tribunal
9 found these facts or the facts that were pleaded in
10 the draft amended claim to be insufficient to
11 establish that the case was within Article 1101(1).

12 To the contrary, the Tribunal found that
13 only certain allegations relating to the intent
14 underlying the U.S. measures could potentially meet
15 the requirements of Article 1101(1) of NAFTA.

16 On the subject of the final and binding
17 nature of the Award, I did not hear anything in
18 Methanex's remarks yesterday on the subject of its
19 motion for reconsideration that requires comment,
20 from my perspective. I would be happy to answer
21 any questions the Tribunal has on the subject of

1 the motion for reconsideration now, or I can move
2 on to my next topic.

3 ARBITRATOR ROWLEY: You told us,
4 Mr. Legum, that we have no jurisdiction to allow
5 the amendment and that conditions precedent to
6 asserting a new claim had not been met. Can you
7 please take us to the provisions of NAFTA on which
8 you rely so we know what you're speaking of.

9 MR. LEGUM: What I have in mind is Article
10 1119, which requires a notice of intent to submit a
11 claim to arbitration, and then Article 1121(1),
12 which requires that the consent to arbitration be
13 accordance with the procedures set out in this
14 agreement.

15 If I can also refer the Tribunal to the
16 Amended Statement of Defense--I don't have the
17 exact reference right in front of me, although I
18 can get that, there is a part of that that sets
19 forth our legal grounds in some detail.

20 ARBITRATOR ROWLEY: Could I just ask you
21 to help me with respect to 1121(1), subsection B.

1 1121(1) says a disputing investor may submit a
2 claim under Article 1116 to arbitrate only if, and
3 then A, it speaks of the investor's consent; and B,
4 it speaks about a waiver from the investor.

5 With respect to the measure of the
6 disputing party, which is alleged to be a breach
7 referred to in Article 1116, is it your position
8 that there has not been a waiver with respect to
9 this CaRFG3 measure?

10 MR. LEGUM: It is my recollection that the
11 waivers that Methanex provided did not apply
12 to--did not encompass this particular measure of
13 the conditional prohibition, but I frankly have not
14 gone back and looked at the text of those waivers
15 to see whether an alternate construction would be
16 possible.

17 ARBITRATOR ROWLEY: Well, we have the
18 afternoon, and you have my question.

19 MR. LEGUM: Thank you.

20 PRESIDENT VEEDER: Thank you, Mr. Legum.
21 Shall we move on to the next speaker or do you want

1 to--your second or third points?

2 MR. LEGUM: I have more, yes.

3 PRESIDENT VEEDER: Please go on.

4 MR. LEGUM: A word on prejudice.

5 Methanex asserted yesterday that the
6 United States would suffer no prejudice if this
7 amendment were allowed over four years into this
8 arbitration. It is fundamental that the United
9 States has a right to know the case that it must
10 meet. In this case, we have seen constantly
11 shifting claims, theories, arguments, even facts
12 and sworn witness testimony offered and withdrawn
13 as if they were pawns on a chess board. Ms. Guymon
14 will later on this afternoon address Methanex's new
15 theory under Article 1105(1), which is nowhere
16 pleaded in its fresh pleading.

17 But my point here is that it is unfair,
18 inefficient, costly and prejudicial to have to
19 respond over and over again to ever-shifting
20 assertions, and the United States is frankly
21 outraged that Methanex would suggest another

1 amendment after all of these years.

2 Before I leave the topic of amendment, one
3 point that the Tribunal should keep firmly in mind
4 when it considers the question of costs--this is my
5 next slide--this is what Methanex represented to
6 the Tribunal in 2001 in justifying its interruption
7 of the previously agreed schedule for briefing
8 jurisdiction and admissibility and repleading its
9 case. Repleading its case, I should note, less
10 than six months after submitting its August 2000
11 reply, which itself was double the length of its
12 original Statement of Claim.

13 Here, and this is my next slide, is what
14 Mr. Puglisi testified on Wednesday of last week
15 (reading):

16 QUESTION: Now, this appears to be a
17 draft of an itinerary for Tuesday, August
18 4, 1998; is that correct?

19 ANSWER: It appears that way to me,
20 too, yes, sir.

21 QUESTION: I see. You testified that

1 when you brought this document to the
2 attention of your client--excuse me--you
3 testified that you brought this document
4 to the attention of your client; is that
5 correct?

6 ANSWER: Yes, sir.

7 QUESTION: And that would have been
8 in 1998; is that correct?

9 ANSWER: Yes, sir.

10 In 2001, Methanex represented to the
11 Tribunal and to the United States that it
12 discovered the August 1998 dinner in 2000, shortly,
13 and conveniently, after the U.S. submitted its
14 original objection to jurisdiction. Mr. Puglisi,
15 however, discovered that same meeting in 1998 and
16 thought it so important that he specifically
17 remembered years later bringing it to the attention
18 of Methanex.

19 MR. DUGAN: Objection. His testimony is
20 that he brought it to the attention of his client,
21 which at the time I think he identified is the law

1 firm, not Methanex. There was no testimony in the
2 record that he ever gave that to Methanex.

3 MR. LEGUM: How it was that Methanex
4 discovered in 2000 what it or its attorneys knew
5 since 1998 is a question the answer to which the
6 record does not provide.

7 Turn now to my next point, which is that
8 Methanex's argument based on the conditional
9 prohibition is an utterly arid academic argument.
10 The conditional prohibition of Methanex had no
11 effect at all on methanol producers, and this is
12 undisputed. This is my next slide. Methanex
13 admitted this in response to a question by
14 Professor Reisman. As can you see, yesterday, in
15 its closing, Methanex stated--you asked what is the
16 substantive effect of this latest change for
17 methanol producer? There is none. It's been
18 banned for use as an oxygenate conditionally, to
19 use the words of the United States, for many years.
20 The witness statement of James Caldwell,
21 which the United States submitted with its Amended

1 Statement of Defense in December of 2003, confirms
2 that Federal law has prohibited use of methanol as
3 an oxygenate additive in gasoline for many years.
4 The California conditional prohibition had no
5 effect at all.

6 As a result, that Methanex's argument that
7 it will refile its claim unless an amendment is
8 allowed is no more than an idle threat. No claim
9 can be brought on the basis of this measure. It
10 has no effect on methanol producers or Methanex.
11 It could not serve as a basis for a claim under
12 Articles 1116 or 1117 of the NAFTA. It is not a
13 measure in any sense relevant to this claim which,
14 from its filing in 1999, has been based on the ban
15 of MTBE in California gasoline, not any other ban.

16 Finally, last Tuesday, I noted that
17 California's purpose in listing the 11 compounds
18 was to provide refiners with a verifiable basis for
19 complying with the conditional prohibition. The 11
20 compounds were listed because they were included in
21 a standard industry testing methodology for

1 gasoline. The Tribunal will recall that Mr. Dugan
2 interrupted my presentation and asked for a cite to
3 the record, which I provided. We heard no
4 contention yesterday that the purpose behind
5 California's listing those 11 compounds was
6 anything other than what California said it was.

7 For these reasons, the Tribunal should
8 reject Methanex's assertion that the conditional
9 prohibition establishes that the MTBE ban relates
10 to Methanex.

11 ARBITRATOR ROWLEY: Have you've got that
12 cite handy again? Of course, we have it in your
13 earlier transcript, but if you have it handy, it
14 might be nice to have it now.

15 MR. LEGUM: I will provide it at the
16 break, if that's all right.

17 I turn now to my next principal topic,
18 which is responding to Methanex's assertions
19 yesterday that the ban of MTBE was intended to harm
20 methanol producers.

21 Now, in my presentation last Tuesday, I

1 demonstrated that the record in no way supported
2 Methanex's assertion that there was a vast
3 conspiracy between Governor Davis, ADM and many
4 others to harm methanol producers by banning MTBE.
5 In its closing yesterday, Methanex did not press
6 that theory; and, in fact, in examination of
7 witnesses, Mr. Dugan, for example, did not ask a
8 single question of Mr. Vind concerning methanol.
9 There was no reference yesterday to Methanex's
10 earlier assertions of a state conspiracy against
11 methanol. Instead, it argued its case of intent
12 based on two theories: Competition and
13 foreseeability. Neither of those conditions
14 withstands scrutiny.

15 First, competition. As now articulated
16 and as I demonstrated last Tuesday, Methanex's
17 competition claim is no different from what it
18 alleged in its Amended Statement of Claim. The
19 First Partial Award, as I showed last week,
20 addressed and rejected that theory.

21 Second, the record simply doesn't support

1 that theory, in any event. Methanex ironically
2 highlighted this yesterday when it relied on the
3 testimony of Bruce Burke for this competition
4 point, and described him as an economic expert.
5 Mr. Burke is a chemical engineer, not an economist.
6 There is no testimony by an economic expert in this
7 case on the supposed competition that Methanex
8 asserts.

9 And Mr. Burke's testimony does not support
10 Methanex. Contrary to Methanex's characterization
11 and as Professor Reisman pointed out, Mr. Burke
12 disagreed with Methanex's assertion of a continuous
13 supply chain for gasoline. Mr. Burke testified
14 clearly that the point at which methanol and
15 ethanol are added to gasoline is relevant to the
16 competition analysis and that those two products do
17 not compete.

18 Consider Mr. Burke's testimony on day six
19 of the hearing at page 1448, lines 2 through 14.
20 And I will quote that (reading).

21 QUESTION: Is it your testimony that

1 the gasoline supply chain is a continuous
2 cycle rather than divided among refiners
3 and blenders?

4 ANSWER: Yeah, it's a continuous
5 supply chain.

6 QUESTION: So, as a continuous supply
7 chain, Methanex's contention that the
8 precise point of the addition of oxygen to
9 gasoline is irrelevant when considering
10 the competitive relationship between
11 methanol and ethanol is valid since the
12 supply chain is a continuous cycle; would
13 you agree?

14 ANSWER: That's Methanex's position?

15 QUESTION: Yes.

16 ANSWER: I don't agree with it.

17 In his December 2003 expert report,
18 Mr. Burke meticulously described the production
19 processes for MTBE and ethanol, the oxygenates that
20 are blended with gasoline in the U.S. market. His
21 testimony unequivocally establishes that methanol

1 is to reformulated gasoline what corn is to
2 reformulated gasoline. Both are no more and no
3 less than feedstocks for the compounds that are
4 actually added to gasoline to satisfy the oxygenate
5 requirement of Federal regulation.

6 Characterizations by counsel of a
7 continuous supply chain for gasoline do nothing to
8 change this reality.

9 I turn now to foreseeability.
10 Foreseeability is not the test for intent. It
11 cannot be the test for intent. Methanex has
12 offered no authority equating foreseeability and
13 intent. The two are different and the law has
14 always treated them differently. Foreseeability is
15 an objective standard. The issue is not what the
16 subject thought, but what a reasonable person would
17 have thought. Intent, however, is a subjective
18 standard. The only issue is what the subject
19 thought. Foreseeability is not the same at all as
20 intent.

21 Moreover, as the amici have noted, from a

1 policy perspective, foreseeability would be a
2 completely unworkable standard for assessing
3 government rulemaking. Governments often try to
4 assess sometime distant and speculative impacts of
5 regulations that they are considering. Adopting a
6 foreseeability test could chill this useful
7 practice.

8 And finally, the record does not support
9 Methanex's argument that California, in fact,
10 foresaw harm to Methanex from the MTBE ban. Last
11 Tuesday, I showed why the 1993 EPA notice, and
12 Mr. Wright's double hearsay testimony, deserved no
13 weight. Methanex has not attempted to respond to
14 that showing.

15 Before moving on to the next topic, I
16 would like to address briefly Methanex's assertions
17 that the Tribunal should draw an adverse inference
18 from the United States's failure to produce the
19 Andreases or the NAFTA travaux preparatoires. We
20 would agree that in some circumstances it is
21 appropriate for an Arbitration Tribunal to draw an

1 adverse inference from a party's failure to produce
2 requested evidence, but there are certain essential
3 preconditions that must be met that are entirely
4 lacking here. And this is my next slide, which is
5 Article 9 of the IBA Rules, and it's the--it's
6 paragraph four which addresses adverse inferences
7 from failure to produce documents.

8 Now, this is not one of the Articles that
9 the parties agreed that the Tribunal would apply
10 here, but our view is that it represents general
11 arbitral practice. The provision says, if a party
12 fails without satisfactory explanation to produce
13 any documents requested in a request to produce to
14 which it has not objected in due time or fails to
15 produce any document ordered to be produced by the
16 Arbitral Tribunal, the Arbitral Tribunal may infer
17 that such document would be adverse to the
18 interests of that party.

19 Now, this requires, A, that there be no
20 objection to the request for documents; and B, that
21 the Tribunal have entered an order requiring

1 production which order was not obeyed. Neither one
2 of these things is present here.

3 While we are talking on the subject of the
4 travaux, I would note that the United States is
5 content to rest on the arguments set forth in our
6 letter of June 3, but I would be happy to address
7 any questions that the Tribunal has about
8 Methanex's request for travaux preparatoires, if
9 it has any.

10 PRESIDENT VEEDER: In that submission, did
11 you deal with the new application made yesterday in
12 regard to Article 1105?

13 MR. LEGUM: I believe we did. New in the
14 sense of new rationale for it, because there was a
15 reference to--it's true, it was not mentioned in
16 its earlier letter, that's correct. We did not
17 deal with 1105.

18 PRESIDENT VEEDER: Do you want to deal
19 with that today? Or would the same arguments
20 apply?

21 MR. LEGUM: The same arguments would

1 apply.

2 PRESIDENT VEEDER: Thank you.

3 MR. LEGUM: Any other questions?

4 PRESIDENT VEEDER: Please proceed,

5 Mr. Legum.

6 MR. LEGUM: I would like to turn to my
7 final point. The record here confirms, in a number
8 of respects, that the MTBE ban does not relate to
9 Methanex. First of all, the record shows that the
10 MTBE ban has had no impact on the methanol
11 industry. My colleague, Mark McNeill, will have
12 more to say about this in a few minutes, but my
13 point here is that although the test for relating
14 to is more stringent than requiring a mere effect
15 on a claimant or on an investment, as the First
16 Partial Award noted, the fact that the record here
17 doesn't even show an effect on Methanex or the
18 methanol industry confirms that the MTBE ban does
19 not relate to methanol or to Methanex. And for
20 this proposition, we would refer you to pages 96
21 through 1118 (sic) of the Amended Statement of

1 Defense, and pages 61 to 63 of the U.S. rejoinder.
2 118 of the Amended Statement of Defense and pages
3 61 to 63 of the Rejoinder.

4 ARBITRATOR ROWLEY: I will note for the
5 record it shows up on the transcript as 1,118.

6 MR. LEGUM: It should be 118.

7 The second piece of evidence that I would
8 like to draw to the Tribunal's attention is also
9 mentioned in the Amended Statement of Defense,
10 paragraph 340 of that document and note 553. That
11 paragraph refers to the extensive litigation
12 brought against oil companies and MTBE producers
13 for MTBE contamination of water supplies, the
14 claims in those cases principally that MTBE is a
15 defective product.

16 If methanol were, as Methanex asserts
17 here, the key component in MTBE with isobutylene
18 merely serving, as Methanex puts it, as a
19 convenient delivery vehicle, why is it that none of
20 these cases have been brought against Methanex? If
21 methanol is really the key component of MTBE, why

1 don't these cases brought in the real world, why
2 aren't they brought against Methanex? The answer
3 is that the product is MTBE; methanol is merely a
4 feedstock for MTBE, and it would be a radical
5 departure, under many views, for liability to be
6 imposed on the maker of a feedstock to a defective
7 product.

8 And the final part of the record that I
9 would like to refer the Tribunal to was introduced
10 by Methanex. This was the unenacted bill that was
11 introduced in February of this year. It's the
12 Energy Policy Act of 2003, and the citation is
13 19 JS tab 1 C. Methanex, in its opening argument,
14 referred to this unenacted bill and in particular
15 to its provision for monetary relief for MTBE
16 producers in the event that a nationwide MTBE ban
17 in gasoline was put into place. The transcript
18 references for that are day one, page 31, lines 8
19 through 16, and the same day page 210, lines 9
20 through 16.

21 The question is, why does this bill

1 provide relief only for MTBE producers, based on
2 the effects of a nationwide ban of MTBE and not
3 provide relief for methanol producers? The answer
4 again is that a ban of MTBE in gasoline relates to
5 producers of gasoline and producers of MTBE. It
6 does not relate to suppliers of a feedstock like
7 Methanex.

8 The record, in short, confirms that the
9 ban of MTBE in California does not relate to
10 Methanex, and I will turn the floor over to
11 Mr. Pawlak, unless the Tribunal has any further
12 questions.

13 MR. PAWLAK: Good afternoon,
14 Mr. President, and members of the Tribunal.

15 As Mr. Bettauer mentioned, I will revisit
16 briefly certain aspects of the record on the
17 scientific evidence.

18 First, as predicted, the time that was
19 devoted to the science underlying the MTBE ban
20 during this hearing was disproportionate to its
21 relevance to the issues in this case. As I

1 explained last Tuesday, the record on the science
2 is of, at best, very limited relevance. It has
3 been relevant only insofar as Methanex could prove
4 that the scientific evidence on MTBE before the
5 California officials was a sham, a sham that merely
6 covered up the secret intent of the ban to harm
7 methanol producers. Methanex has done no such
8 thing.

9 To the contrary, four U.S. witnesses
10 testified for several hours in all. Each
11 demonstrated that the scientific evidence
12 underlying the MTBE ban was, and remains, sound.
13 At a minimum, the record on the science reflects
14 genuine strong support for the ban. California
15 decision makers were reasonable to rely upon that
16 science.

17 I do not propose to highlight now the
18 salient points of the testimony presented by each
19 witness. However, Methanex's mischaracterization
20 yesterday of certain portions of the testimony
21 offered by U.S. witnesses requires a response.

1 This brings me to my second point.

2 Yesterday, Methanex asserted that the
3 witness testimony somehow supports its contention
4 that benzene posed a greater threat to the
5 environment than MTBE; and, therefore, California
6 improperly singled out MTBE for regulation.
7 Methanex's assertion is inaccurate and does not
8 accord with the expert evidence.

9 Last Friday, Drs. Happel and Fogg were
10 eminently authoritative and reliable in their
11 testimony. In addition to detailing that the
12 threat posed by MTBE to California water resources
13 was significant and widespread, the Tribunal will
14 recall that both Drs. Happel and Fogg considered
15 the threat to groundwater resources from benzene,
16 on the one hand, and from MTBE on the other.

17 Yesterday, however, referring to
18 Dr. Happel's testimony, Methanex asserted, and I
19 quote, and you can see this on slide one in your
20 packet or up on the screen, quote, Even their own
21 experts concede that benzene is a worse problem

1 than MTBE, end quote. And you may find that
2 assertion in yesterday's transcript at page 1860,
3 lines 16 and 17.

4 A second reference, on the next slide, is
5 at page 1864, lines 17 through 20. There, again,
6 Methanex claimed, quote, Their own experts'
7 calculation showed that benzene was worse as a
8 contaminant in terms of prevalence in California's
9 drinking water than MTBE is, end quote.

10 And on the third slide, which is at 1926
11 of the transcript, lines 8 through 10, Methanex
12 again asserted, quote, In the words of the United
13 States's own expert, benzene is a more serious risk
14 than MTBE, end quote.

15 Contrast the testimony offered by
16 Drs. Happel and Fogg on these points to Methanex's
17 characterization of that testimony. First,
18 Dr. Happel did not testify that benzene is a worse
19 problem than MTBE. To the contrary, as noted in a
20 question from Professor Reisman yesterday,
21 Dr. Happel addressed the relative rates of

1 intrinsic bioremediation, comparing benzene and
2 MTBE as follows. And you will find this testimony
3 in the transcript at day five of the hearing at
4 pages 1166, line 20 through page 1167, line 8.
5 It's also on your next slide. Dr. Happel stated,
6 studies show that especially for small volume
7 chronic releases that benzene and other gasoline
8 hydrocarbons are biodegraded over time and fairly
9 quickly, whereas MTBE was shown to be resistant to
10 biodegradation under these natural conditions.

11 So, in the case of small volume chronic
12 releases, benzene and the other hydrocarbons are
13 not much of an issue of concern.

14 Dr. Happel detailed similar conclusions in
15 her rejoinder report at 24 JS tab C. The specific
16 pages are 31, 32, and 37.

17 Methanex similarly mischaracterized the
18 testimony of Dr. Happel regarding the prevalence of
19 MTBE relative to that of benzene in California's
20 water supply. Again, consider Dr. Happel's
21 testimony on day five, and this is at pages 1205

1 through 1208, and also on your next slide, which is
2 slide five. There, in reviewing Tables 6 and 7 of
3 her rejoinder report, Dr. Happel confirmed that
4 benzene is more prevalent than MTBE in California's
5 public water supply wells. She testified, quote,
6 MTBE is ranking second in concentrations in public
7 wells, and again, I would just like to say that
8 this is really not a positive picture for MTBE,
9 given that the very--given the very recent
10 introduction of MTBE into California's environment.

11 Dr. Happel's oral testimony is entirely
12 consistent with her written reports. For the
13 record cite on these points, I direct the Tribunal
14 to Dr. Happel's rejoinder report, 24 JS tab C at
15 pages 38 through 46.

16 Now, Dr. Fogg's testimony was to similar
17 effect on both the comparative biodegradation and
18 prevalence points. Consider his testimony on day
19 five at pages 1113, line 12, through 1114, line 3.
20 Dr. Fogg testified, MTBE is largely resistant to
21 biodegradation, unlike benzene, which is readily

1 biodegraded under both aerobic and anaerobic
2 conditions under actual field conditions. So, the
3 MTBE isn't going away. We know that MTBE alone,
4 not benzene, is contaminating these wells in the
5 vast majority of the cases, end quote.

6 In short, comparing slides one through
7 three from Methanex's closing yesterday to slides
8 four through six from the testimony on Friday,
9 Methanex's representations to this Tribunal on the
10 comparative risks of benzene and MTBE simply are
11 not supported by the testimony of record.

12 Methanex similarly ignored Mr. Burke's
13 testimony in asserting yesterday, and I quote, So
14 taking action against benzene was perfectly
15 feasible for California to do. It didn't, end
16 quote. And that's at 1861 of the transcript, lines
17 18 through 20.

18 What Mr. Burke did testify to, in reducing
19 benzene content from California's currently
20 permissible levels of 0.7 percent to, quote, parts
21 per billion or literally zero, the costs get

1 astronomically higher. And that is Mr. Burke's
2 testimony from day six, and the transcript cite is
3 1471, lines 6 through 8.

4 In addition, as I demonstrated last
5 Tuesday, and again contrary to Methanex's
6 assertions yesterday that, quote, California took
7 no steps, end quote, with respect to benzene,
8 California has taken action to protect against
9 benzene contamination. For example, California has
10 imposed restrictions on the benzene content of
11 gasoline that are more severe than those imposed by
12 the Federal Government. There is no support for
13 Methanex's claim that MTBE was singled out.

14 My third point goes again to Methanex's
15 characterization of the expert testimony. Consider
16 slide seven, excerpting the transcript of yesterday
17 at page 1929, lines 13 through 18. There,
18 referring to Dr. Happel's testimony, regarding,
19 quote, 10,000 points of water polluted by MTBE, end
20 quote, we heard Methanex characterize Dr. Happel's
21 testimony as, quote, the type of gross exaggeration

1 that has accompanied this whole debate, end quote.
2 Methanex again has missed the point. The
3 methodology employed by Dr. Happel was a review of
4 actual data. Dr. Happel was merely relying the
5 results of data reported by individuals responsible
6 for the leaking tanks to the State of California.
7 As Dr. Happel testified, at page 1163 of the
8 transcript, lines 10 through 15, and this is on
9 slide eight in your packet, quote, There is no
10 predictive value here. I'm looking to say how many
11 of the leaking tank sites that have been tested for
12 MTBE have found MTBE pollution in the groundwater,
13 and she said, and the answer is around 10,000, end
14 quote. It's slide eight, day five.

15 And as Dr. Happel explained in her
16 testimony in Table 6 at page 32 of her December
17 report, which is 13 JS tab E, she set out the
18 concentration distribution of those 10,000
19 detections of MTBE. And in that December report,
20 it is identified that more than 1,700 of those
21 sites reflect detections of MTBE concentrations

1 greater than 20,000 parts per billion. In all,
2 thousands of these contaminated sites were within
3 one half mile of drinking water wells,
4 demonstrating the vulnerability of California's
5 drinking water to future MTBE contamination. And
6 for that, you can refer to Table 2 on page 27 of
7 Dr. Happel's rejoinder report, which is
8 24 JS tab C.

9 Dr. Happel's testimony alone makes clear
10 that the MTBE problem was no illusion.

11 My final point is best illustrated by the
12 expert evidence on the cost/benefit analysis of the
13 MTBE ban. Dr. Whitelaw, in Methanex's competing
14 cost/benefit analysis, exchanged nearly 200 pages
15 of expert testimony. Dr. Whitelaw's testimony on
16 Monday spanned nearly 100 pages of the transcript.
17 Methanex's sole reference to cost/benefit analysis
18 in its closing is its suggestion that Dr. Whitelaw
19 admitted criticism of one portion of the UC
20 report's analysis.

21 But that supposed admission was clearly

1 set forth on the third page of Dr. Whitelaw's
2 opening expert report, and that's at 13 A JS tab K.
3 There, Dr. Whitelaw noted the criticism regarding
4 sunk costs had been widely acknowledged in the
5 public record on the UC report before the issuance
6 of the March 1999 Executive Order. Methanex simply
7 ignored the point of Dr. Whitelaw's expert evidence
8 which, stated succinctly, was as follows: When
9 asked whether the decision by California officials
10 to ban MTBE was an economically sound one,
11 Dr. Whitelaw testified, quote, end quote, You bet.
12 And that's at day six of the transcript, at page
13 1505, line 13.

14 Although Dr. Whitelaw acknowledged
15 criticism of the UC report analysis, he showed his
16 cost/benefit analysis would have reached the same
17 results as that of the UC report. Despite the
18 intensity of the effort on the part of Methanex and
19 its experts, Methanex has gained no ground in its
20 attempt to show otherwise. The same could be said
21 with respect to each of the subject areas on which

1 the Tribunal has received expert evidence. In
2 summary, there is no basis for Methanex's claim
3 that California officials somehow improperly
4 singled out MTBE. California officials had ample
5 reason to accept the soundness of the scientific
6 conclusions regarding MTBE that were before them.
7 No evidence even remotely suggests that the science
8 underlying the ban was a sham.

9 Thank you. And if there are no questions,
10 I will turn the floor over to Ms. Menaker.

11 PRESIDENT VEEDER: Thank you. We have no
12 questions at this stage.

13 Ms. Menaker.

14 MS. MENAKER: Mr. President, members of
15 the Tribunal, thank you. As Mr. Bettauer noted, I
16 will now address Methanex's argument that the ban
17 was promulgated in order to benefit ethanol
18 producers.

19 Now, to put this in context, we have
20 already demonstrated that ethanol and methanol do
21 not compete in any meaningful sense. Therefore,

1 even if there was a showing that the ban was
2 promulgated with an intent to benefit ethanol
3 producers, one could not therefrom draw an
4 inference that the ban was promulgated in order to
5 harm methanol producers like Methanex. But as I
6 demonstrated in my opening statements, the evidence
7 in the record belies such a supposed intent.

8 I will first begin by making two general
9 points related to internal inconsistencies with
10 Methanex's case. I will then address the various
11 points that Methanex contended gave rise to an
12 inference of corruption in this case.

13 First, yesterday Methanex directed the
14 Tribunal's attention to two news articles that it
15 contended proved that ADM hired people, and I
16 quote, to whip up hysteria about MTBE, end quote,
17 and that is at page 1865, line 12 of the
18 transcript.

19 Methanex surmised this was why MTBE was
20 perceived to be a problem while benzene was not.
21 Methanex argued that while the ethanol industry

1 would benefit if MTBE were banned, no comparable
2 domestic industry would benefit if benzene were
3 banned. As the U.S. has noted repeatedly, of
4 course, ADM's conduct is not attributable to the
5 United States.

6 So, even if this were the case, this--no
7 inference of wrongdoing could be inferred.
8 Moreover, as we've noted, it is perfectly
9 legitimate and, in fact, to be expected that a
10 politician will act in response to public concern.
11 If, indeed, the motivation behind California's ban
12 of MTBE was hysteria that was whipped up by ADM or
13 the ethanol industry in general, it would be
14 perfectly legitimate for California to act in
15 response to that concern. If Methanex is arguing
16 that this was the motivation or this was the cause
17 of the MTBE ban, that is inconsistent with its
18 theory that California had an ill-founded
19 motivation in banning MTBE, a motivation to benefit
20 the ethanol industry. Those are two internally
21 inconsistent theories.

1 Second, in our opening, I noted the
2 inherent contradiction in Methanex's case; namely,
3 that it has throughout these proceedings, perhaps
4 until this hearing, repeatedly disavowed any
5 argument that Governor Davis had committed any
6 crime, and yet it was asking you to draw an
7 inference based on facts that you could only find
8 if you came to the conclusion that a crime was
9 committed.

10 Now, yesterday Methanex argued that it was
11 not a criminal offense unless there was a quid pro
12 quo. It acknowledged that an explicit quid pro quo
13 was, indeed, illegal, but then it referred to an
14 alleged U.S. concession that there exists instances
15 of corruption that are not criminal acts, where
16 there is no quid pro quo, but there is nonetheless
17 corruption where contributions are given and favors
18 are granted in return, and that is on page 1868 of
19 the transcript at lines 5 through 16.

20 And to be clear for the record, that is
21 not the United States's position and never has been

1 the United States's position, and we note that
2 Methanex cited--did not give any cite to the record
3 when it contended that the U.S. had made this
4 so-called admission.

5 It is, and has always been the United
6 States's position that if favors are granted in
7 return for a contribution, whether done explicitly
8 or implicitly, that is a bribe, and that is a
9 crime. We have submitted the California bribery
10 statute with our legal authorities previously and
11 have repeatedly referred to that statute. That
12 statute provides that every government officer who
13 asks, receives, or agrees to receive any bribe upon
14 any agreement or understanding that his vote,
15 opinion, or action upon any matter then pending or
16 which may be brought before him in his official
17 capacity shall be influenced thereby is punishable
18 by imprisonment of two to four years, forfeiture of
19 his office and is forever disqualified from holding
20 office in the state.

21 So, what is Methanex contending here?

1 Yesterday, it repeatedly referred to, and I quote,
2 an implicit arrangement between Governor Davis and
3 ADM. If there were such an implicit arrangement,
4 that would be illegal.

5 Now, Mr. Vind understands this quite well.
6 In his testimony on page 992 of the transcript, on
7 lines 7 through 11, he stated, and I quote, What I
8 am saying is that you get access if you are
9 supporting those particular politicians, but there
10 is never a quid pro quo. That is a crime. That is
11 called bribery, and I don't do that, sir.

12 On lines 15 through 21 on that same page
13 in response to a question whether there was any
14 express agreement for assistance in exchange for
15 contributions, he replied, no.

16 When asked if there was any implicit
17 understanding, he replied, and I quote, Absolutely
18 not.

19 Methanex's statement that, and I quote
20 from page 1991, lines 9 to 11, that, quote, This
21 is, indeed, one of those cases where that type of

1 corruption takes place, end quote, is a very
2 serious charge. And yet Methanex yesterday
3 represented that it was faced with a situation
4 where there were, and I quote, some fairly
5 significant evidentiary deficiencies, end quote, in
6 its case. And again, that is on page 1820 of the
7 transcript, lines 6 through 8. And we submit that
8 is putting it mildly.

9 Methanex acknowledges that when examining
10 any one of his 11 factors that it set forth
11 yesterday that it would be inadequate to conclude
12 that there was any corruption here, and yet it
13 urges the Tribunal to look at all the factors. But
14 if you add nothing to nothing, you still wind up
15 with nothing. I would like to go through these
16 factors, and I won't go through all 11 of them, as
17 they can be grouped together.

18 First, Methanex has focused yet again on
19 the August 4th, 1998, dinner. Now, according to
20 each of the witnesses, while there was some
21 discussion of ethanol at that dinner, that was not

1 the focus of the discussion at the dinner.
2 Yesterday, Methanex conceded, and I quote, the
3 evidence before you is benign. There is no express
4 evidence that there was any type of agreement, and
5 we don't assert that there is any evidence in the
6 record to that effect, end quote. That is at page
7 1883, lines 15 through 18.

8 Despite all of the evidence pertaining to
9 the dinner being benign, it still asks you to draw
10 an inference that there was some implicit
11 arrangement arrived at during that dinner. It asks
12 you to do this on the grounds that the dinner was
13 allegedly secret.

14 Now, we heard from three witnesses who
15 attended that dinner. All three witnesses
16 testified that they did not perceive the dinner as
17 being secret. You can look at Mr.--I'm sorry, I
18 don't have the exact citations for you.

19 Now, Methanex acknowledges that Governor
20 Davis's use of the plane was disclosed in his
21 campaign finance forms, and they have repeatedly

1 acknowledged that there was no violation of any
2 U.S. laws pertaining to campaign finances here.
3 There is no support in the record for the
4 proposition that anything more was required to be
5 disclosed pertaining to this meeting or even that
6 it was customary for any more disclosure than was
7 made here to have been made. And I would note
8 again the fact that Methanex has not pointed to any
9 evidence that it publicly disclosed the meetings
10 that its lobbyists held with various California
11 legislators. And, yes, there were no billboards
12 put up announcing this dinner, but this was not a
13 public event. This was a dinner, and normally you
14 don't post billboards announcing dinners.

15 I would also note the irony in questioning
16 Mr. Listenberger, when asking him if this was an
17 important dinner, to which he responded he didn't
18 think it was particularly important. Ms. Callaway
19 asked him or made a point of noting that the
20 Illinois state Police escorted Governor Davis and
21 his entourage to the dinner and asked, isn't that

1 an unusual effect to happen in a small town like
2 Decatur, Illinois, and I'll ask you, if you were
3 intending or trying to keep this dinner secret,
4 would the best way to do that would be to have the
5 State Police escort you through the town of
6 Decatur? The evidence in the record does not
7 support any assertion that this dinner was kept
8 secret.

9 Finally, Methanex simply asserts that
10 something must have happened at the dinner. Again,
11 it acknowledges that the evidence on this point is
12 benign, but it says we should assume that if Marty
13 or Alan Andreas had testified, they would have had
14 something to say. Now, Mr. Legum already noted
15 that there are no grounds here to draw any such
16 adverse inference.

17 But I would like to make one additional
18 point on that issue. Methanex yesterday argued
19 with respect to the Andreases, and I quote from
20 page 1910 of the transcript, lines 10 to 13, quote,
21 We tried to get them here, we weren't allowed to,

1 end quote. On page 1911 of transcript, lines 1
2 through 6, they asked to you draw an adverse
3 inference that something untoward had happened at
4 this dinner and said, quote, You can take that from
5 the fact that they refused to come, and that the
6 United States has blocked our attempts to get that
7 evidence, end quote.

8 Now, what exactly were they referring to?
9 I would suppose that they would like this Tribunal
10 to think that they were referring to our opposition
11 to their motions for applications made under
12 Section 1782. However, I would note for the
13 Tribunal that the applications that Methanex filed
14 under Section 1782 were filed in two District
15 Courts in California and neither of those
16 applications even sought the testimony of Marty or
17 Alan Andreas. Those 1782 applications were all
18 directed at California officials, Mr. Dick Vind,
19 who voluntarily appeared, and Ms. Lynn Suter.
20 Methanex made no attempt to file an application
21 under 1782 in the District Court in Illinois or, to

1 the best of our knowledge, do anything else to try
2 to get Mr. Alan or Marty Andreas to appear. So, I
3 do not know how the United States has blocked their
4 efforts in this regard.

5 Now, the second set of factors that
6 Methanex points to is the fact that political
7 contributions were made by ADM, and I addressed
8 this in my opening and won't repeat all of those
9 arguments here. However, what Methanex focused on
10 yesterday was the identity of the donee itself.
11 Basically, they said that an inference in this case
12 was warranted because Mr. Vind and ADM were the
13 ones making these contributions, and they were
14 interested in making contributions to politicians
15 whom they thought would support issues important to
16 them.

17 As the Tribunal recognized, this is no
18 surprise. When we vote, we vote for those
19 politicians whom we hope will take positions that
20 will benefit us. And if we are to have, as we do
21 in the United States, a political system which

1 permits private funding of campaigns, then
2 naturally people are going to make campaign
3 contributions to those candidates whom they believe
4 will take positions that will benefit them. If
5 such an inference were drawn from this very fact,
6 indeed the whole system of political campaign
7 contributions in the United States would have to be
8 deemed to be corrupt.

9 PRESIDENT VEEDER: If I can just interpose
10 here, because it's relevant to what you're saying,
11 Ms. Menaker, yesterday at page 1875 of the
12 transcript we asked Mr. Dugan, just to make it
13 absolutely clear, somebody who makes a contribution
14 to a politician not looking for a quid pro quo by
15 itself, that is not a criminal offense.
16 Unfortunately in line 5 the word "not" has been
17 omitted, so it now looks rather a stupid question.
18 In self-defense, I think that should be corrected
19 in the way I've just indicated, but that was the
20 way we understood Mr. Dugan's answer.

21 MS. MENAKER: But nevertheless Methanex is

1 asking you to draw an inference based on the fact
2 that it was ADM that was making this contribution,
3 but we can disregard the fact that, of course, ADM
4 is going to make contributions to politicians that
5 it hopes will support interests in its favor. But
6 what are the other issues that make ADM special in
7 this regard or warrant an inference drawn from the
8 fact that it was ADM that made the contribution and
9 not some other company? Methanex pointed to a few
10 facts.

11 First, it stated that ADM was an Illinois
12 company without any ethanol plants in California,
13 and thus did not have a legitimate reason for
14 making contributions, and on this basis it sought
15 to distinguish the contributions made by ARCO.
16 However, the evidence proves otherwise, and
17 Mr. Listenberger's statement and in the
18 cross-examination of Mr. Listenberger, you will
19 recall that he testifies that ADM had substantial
20 business in California. Well, they did not have an
21 ethanol plant in California. They still did have

1 substantial business in California, and thus ADM,
2 like any other business in California, could be
3 considered a constituent with interests in that
4 state.

5 Finally, ADM--excuse me--Methanex just
6 relied on the fact that ADM has, in its words, a
7 history of bad acts or engaging in illegal
8 activity. Of course, no such inference can be
9 drawn from that fact. If that were the case, a
10 similar inference would have to be drawn against
11 any politician that accepted a campaign
12 contribution from ADM. ADM, like any other
13 citizen, should be permitted to make a lawful
14 contribution, and no inference of wrongdoing should
15 be inferred on the basis that it is ADM rather than
16 any other corporate citizen that is making that
17 contribution.

18 Third, Methanex referred to the factor
19 that it was Gray Davis who was receiving the
20 contributions; so, regardless of the motivation of
21 the person who is making them, that the Tribunal

1 should take note that it was Mr. Gray Davis himself
2 receiving them. In this regard, Methanex pointed
3 to a newspaper editorial that referred to Mr. Gray
4 Davis as "the coin-operated Governor" and remarked
5 that Mr. Gray Davis was not Mother Teresa, that he
6 was in a different category.

7 To ask this Tribunal to draw an inference
8 that a former Governor of California was corrupt on
9 this type of evidence is truly shocking.

10 The last set of factors that Methanex asks
11 this Tribunal to consider was its claim that
12 Governor Davis embraced ethanol, that he didn't
13 just ban MTBE, but that he shifted to ethanol. The
14 first, in support of this argument, Methanex
15 referred to the testimony of Mr. Vind, where
16 Mr. Vind testified that at Gray Davis's birthday
17 party, at Governor Davis's birthday party, excuse
18 me, he had a very brief discussion with Governor
19 Davis where Governor Davis asked him to intercede
20 in trying to work out a compromise on some issues
21 between the oil companies and the ethanol

1 producers.

2 And yesterday Methanex asked you to take
3 notice of Governor Davis's birthday as being
4 December 26, and assumed that this conversation,
5 therefore, took place before the Executive Order
6 was announced three months earlier. And that
7 presumption is not supported by the evidence in the
8 record. The evidence that we do have is from
9 Mr. Vind. He testified that this conversation did,
10 indeed, take place at a birthday party for Governor
11 Davis. He couldn't remember the date, but he
12 recalled three things very clearly. The first
13 thing was that this birthday took place after the
14 Governor was in office because he specifically
15 recalled that the birthday party was in honor of
16 Governor Davis, and therefore wasn't in honor of
17 Lieutenant Governor Davis or wasn't in honor of
18 Governor-Elect Davis. He also specifically
19 recalled that it was after the Executive Order had
20 been signed, and he said that it occurred sometime
21 substantially after Governor Davis had been

1 elected.

2 Now, Governor Davis was elected in
3 November of 1998. His birthday is December 26. He
4 was inaugurated on January 4th, 1999, and he signed
5 the Executive Order on March 25th, 1999. Taking
6 those facts and the testimony of Mr. Vind into
7 account, it is reasonable to assume that the
8 birthday party he was alluding to in fact took
9 place in December of 1999 or later.

10 PRESIDENT VEEDER: You both referred to
11 his birthday, but his birthday is not in the
12 record, is it?

13 MS. MENAKER: It is not. I did the same
14 Google search as Methanex did, I suppose, and found
15 that.

16 PRESIDENT VEEDER: Is it agreed we can
17 take his notice of his birthday although it's not
18 in the evidential record?

19 MS. MENAKER: I have no problem with your
20 doing so.

21 PRESIDENT VEEDER: Mr. Dugan?

1 MR. DUGAN: It's agreed with us.

2 PRESIDENT VEEDER: Thank you.

3 MS. MENAKER: And you can I would think
4 also take judicial notice of the inauguration date.

5 PRESIDENT VEEDER: That, we have in the
6 record.

7 MS. MENAKER: Now, second--or arbitral
8 notice, excuse me.

9 Now, Methanex also argued as evidence for
10 the fact that of Governor Davis's alleged rush to
11 embrace ethanol and its shift to ethanol, that it
12 had--that the Governor had presumed that ethanol
13 would replace MTBE before any studies were done,
14 and it relied very heavily on a statement made by
15 Mr. Kenny to Congress made in October 1999 where
16 Mr. Kenny stated that if MTBE were banned, ethanol
17 would be the only feasible oxygenate.

18 Methanex stated that it hadn't heard from
19 the United States on this issue and, in fact,
20 accused the United States of ignoring inconvenient
21 and stubborn facts, and even demanded a response to

1 hear what we would say our justification for
2 Mr. Kenny's statement was.

3 Now, if we haven't explicitly responded to
4 this point, it is because we believed it was
5 unnecessary; that Mr. Kenny's statement, taken in
6 context, was quite obvious. As has been repeatedly
7 noted throughout these proceedings, although there
8 are a number of chemicals that may technically be
9 oxygenates, only two have ever been used in any
10 discernible amount in the United States for both
11 legal and market reasons. These two oxygenates are
12 MTBE and ethanol, and this is no secret now and was
13 no secret back when Mr. Kenny spoke to Congress
14 back in October of 1999.

15 I would direct the Tribunal's attention to
16 Mr. Macdonald's first affidavit filed in this case.
17 It was attached to Methanex's Rejoinder to the U.S.
18 Reply on Jurisdiction and Admissibility that was
19 dated May 25th, 2001. In paragraph eight of that
20 rejoinder--excuse me, that affidavit--Mr. Macdonald
21 stated, and I quote, Gasoline blenders and

1 distributors may oxygenate their reformulated
2 gasoline with any oxygenate available on the
3 merchant market, including ethanol, MTBE, ETBE, and
4 TAME. Typically, gasoline blenders have relied
5 upon either MTBE or ethanol to meet their oxygenate
6 needs, end quote.

7 Again, in Mr. Macdonald's second
8 affidavit, which was attached as Tab A to
9 Methanex's Second Amended Statement of Claim, at
10 paragraph 14 he stated, and I quote, Although
11 blenders and refiner have always had the choice
12 between all four oxygenates, subject to their
13 technical requirements, these blenders and refiners
14 have primarily chosen MTBE or, to a much lesser
15 extent, ethanol, end quote.

16 In Mr. Bruce Burke's report, which is
17 located at 13 JS tab B, paragraph 21, he states,
18 and I quote, In the United States there are
19 primarily two oxygenates, MTBE and ethanol, used in
20 motor gasoline, end quote.

21 In Mr. Dean Simeroth's first witness

1 statement located at 13 A JS tab H, at paragraph 14
2 he states, and I quote, MTBE became the oxygenate
3 of choice of most refiners for meeting the Federal
4 RFG oxygen requirements in California, end quote.

5 He goes on to say in the next paragraph,
6 15, quote, Ethanol is another oxygenate which has
7 been used in limited amounts in California
8 reformulated gasoline, end quote.

9 California officials knew this. They knew
10 that if MTBE were banned and an oxygenate was still
11 required to be used to meet Federal requirements,
12 that oxygenate would be ethanol. We have never
13 denied this.

14 So, what did California do? Did it rush
15 to embrace ethanol? No, it did two things. First,
16 it immediately directed that very thorough studies
17 of ethanol be undertaken, and why ethanol? Why not
18 MTBE, ETBE, DIPE, or TAME? Because none of those
19 chemicals that are technically oxygenates had ever
20 been used in any significant amount in gasoline in
21 the United States, and there was no reason to

1 suspect that they would be used in the face of an
2 MTBE ban. Of course, it made sense to study the
3 chemical that would likely be used.

4 MR. DUGAN: Excuse me. Is there any
5 evidence in the record to support this, that that's
6 why they made that decision? I would like to
7 object. I think there's no evidence in the record
8 that that's why California officials made that
9 decision.

10 MS. MENAKER: There is. The evidence that
11 is in the record is what I just quoted to you from,
12 that it was widely known that the two oxygenates
13 used in the United States were MTBE and ethanol. I
14 think it is a very fair inference, given the wide
15 knowledge that was available at that time, that
16 California officials were aware of this, and they
17 assumed that if MTBE were banned, ethanol would be
18 used. In fact, that has been part of Methanex's
19 case since the day it filed.

20 PRESIDENT VEEDER: We have a recollection
21 that this was dealt with in the evidence of Dean

1 Simeroth, but we couldn't find it in his oral
2 testimony on day five, and we wondered whether it
3 was elsewhere in his witness statement or materials
4 appended or another expert report.

5 This was also something that came up
6 yesterday in our minds when Mr. Dugan was
7 addressing this.

8 MS. MENAKER: I will, if I may, if I can,
9 during our break I will take a look and try to find
10 the citation.

11 But now, in addition to ordering a very
12 thorough study of ethanol, because, presumably,
13 that would be the oxygenate to replace MTBE,
14 California also sought a waiver of the Federal
15 oxygenate requirement. So, what more could
16 California have done? California banned MTBE
17 because it was contaminating its groundwater. It
18 then sought a waiver so that gasoline sold in
19 California would not have to contain an oxygenate
20 to comply with Federal regulations. It acted
21 cautiously in immediately studying ethanol because

1 it knew that if an oxygenate were to be used in
2 California gasoline, that oxygenate would likely be
3 ethanol. None of this evidence is an intent to
4 benefit ethanol.

5 In conclusion, there is no evidence of any
6 implicit arrangement here. This is Methanex's case
7 to prove and not the United States's case to rebut.
8 But in any case, the evidence in the record does
9 actually rebut Methanex's contention that
10 California was motivated to ban MTBE in order to
11 benefit ethanol. We now know what occurred at the
12 dinner. That conversation was benign. We also
13 know that the Governor took actions that actually
14 were detrimental to ethanol.

15 The testimony from the persons who
16 allegedly benefited from the Governor's actions
17 states that Governor Davis also took some actions
18 that did not benefit the ethanol industry.
19 Mr. Vind testified that he was well aware of
20 California's request for the waiver and the
21 Governor's actions in postponing the ban. When

1 asked if these actions benefitted ethanol, he
2 testified that they did not. There is absolutely
3 no evidence upon which to base a finding that
4 California was motivated to ban MTBE in order to
5 benefit ethanol producers. And Methanex's
6 allegations to the contrary should be rejected.

7 PRESIDENT VEEDER: Just have one question.
8 One of the factors that was raised by Mr. Dugan in
9 regard to the secrecy of the meeting--this was his
10 fifth point and it arises at page 1882 of day
11 eight--was why the dinner or the dinner costs had
12 never been reported by ADM as a campaign
13 contribution-in-kind to Mr. Davis's campaign.

14 MS. MENAKER: And I don't have a
15 definitive answer for you because this is the very
16 first time that we heard this was last night, but I
17 do have some observations to make on that topic.

18 First, Methanex has throughout this
19 proceeding acknowledged that there were no
20 violations of U.S. campaign finance laws. They
21 have maintained that position throughout these

1 proceedings, and yesterday was the first time that
2 we heard any mention of these dinner costs.

3 So, in light of that acknowledgement, we
4 submit that if the dinner costs had to have been
5 disclosed, that they were disclosed. Methanex has
6 offered no evidence to show, one, that it was
7 necessary that they be disclosed; or two, that they
8 were not disclosed.

9 Now, also I would--I do have some
10 additional information from calls that I have tried
11 to make to find out what the exact requirements are
12 and what forms certain things get put on, but if
13 the Tribunal is very interested, I would prefer to
14 make sure that that information is correct before
15 offering speculation at this point because I
16 haven't been able to confirm all of the different
17 requirements, and I don't want to misspeak.

18 PRESIDENT VEEDER: Let's not misspeak,
19 Ms. Menaker. Thank you.

20 MS. MENAKER: Thank you.

21 MR. LEGUM: I suggest that we break for

1 lunch but before we do that--excuse me, lunch--it's
2 been a long week--for the coffee break, but before
3 we do that, I would like to discharge one of my
4 obligations to Mr. Rowley and provide that citation
5 for the statement of reasons for the conditional
6 prohibition of the 11 compounds. That's referenced
7 in the Amended Statement of Defense on page 60,
8 paragraph 149, at note 267 and accompanying texts.
9 And that provides cites to the evidentiary record.

10 PRESIDENT VEEDER: Mr. Legum, did you
11 refer to this on day two?

12 MR. LEGUM: I did.

13 PRESIDENT VEEDER: Do you have the
14 reference to that?

15 MR. LEGUM: I could find it for you at the
16 break.

17 PRESIDENT VEEDER: Thank you very much.

18 Let's break now for 10 minutes. Thank
19 you.

20 (Brief recess.)

21 PRESIDENT VEEDER: Let's resume.

1 MR. LEGUM: Thank you, Mr. President. I
2 will now address Methanex's contentions in its
3 closing with respect to the legal standard of
4 proximate cause, and I will be very brief. In its
5 original jurisdictional submission in November of
6 2000, the United States collected multiple
7 international law authorities establishing the
8 principle of proximate causation under customary
9 international law.

10 Four years later, and after, no doubt, an
11 extensive search, Methanex yesterday presented a
12 sickle authority to the Tribunal on the subject of
13 the standard of proximate cause. This was a new
14 authority not before offered in this case, an
15 excerpt from Prosser and Keeton on torts, a
16 textbook on United States municipal tort law.

17 This case is, of course, not governed by
18 U.S. tort law. It is governed by international
19 law. A standard of proximate causation is well
20 established in international law. Moreover, its
21 application in a case such as this that depends

1 upon the impact of a state act on suppliers to
2 suppliers to the person initially affected is also
3 well established. I would simply refer the
4 Tribunal to paragraphs 225 through 227 of the U.S.
5 Amended Statement of Defense for a collection of
6 representative cases that establish that
7 proposition. Under those cases, it is clear that
8 this claim is too indirect to proceed. And unless
9 the Tribunal has any questions on the subject, I
10 will turn the floor over to Mr. McNeill.

11 PRESIDENT VEEDER: Thank you, Mr. Legum.
12 We have no questions at this stage.

13 MR. MCNEILL: Mr. President, members of
14 the Tribunal, I will be making a few closing
15 remarks on Methanex's failure to prove loss or
16 damage in this case.

17 And i will begin by addressing President
18 Veeder's question yesterday concerning whether
19 Methanex need only show a probability of a loss to
20 get through this stage of the proceedings or
21 whether it need provide actual evidence of a loss.

1 I will refer you to yesterday's transcript at page
2 1980.

3 We believe the answer to this question is
4 clear. Articles 116 and 117 of the NAFTA require
5 more than merely demonstrating the possibility or
6 even the probability of a loss. They require that
7 a claimant demonstrate as an element of its cause
8 of action that it, quote, has incurred a loss or
9 damage, unquote.

10 PRESIDENT VEEDER: I'm sorry, I may
11 have--either I badly expressed myself or it wasn't
12 recorded. I was referring to the burden of proof,
13 the balance of probabilities, that assuming given
14 bifurcation that on the balance of probabilities
15 Methanex can prove they've suffered some loss;
16 i.e., \$1 or more, does that get them through the
17 argument that you're advancing into the next stage
18 of this arbitration?

19 MR. McNEILL: Well, I believe the starting
20 point is they must show actual evidence of loss or
21 damage, and it's not a matter of whether there's

1 probability of loss. I think they must show--they
2 must make some credible showing that there has been
3 an actual loss.

4 PRESIDENT VEEDER: What's the burden of
5 proof, because it can't be a hundred percent, can't
6 necessarily be beyond a reasonable doubt, the
7 criminal burden.

8 MR. McNEILL: I think it must be a
9 credible showing that the evidence shows that there
10 is an actual loss.

11 And to address your question about whether
12 it need be, whether a dollar would qualify, I have
13 never found any case law on this matter, but I
14 would submit that the alleged loss must bear some
15 reasonable relationship to the claim, and here we
16 have a nearly \$1 billion claim. If Methanex could
17 only show \$1 of loss, I would submit that that
18 would not be sufficient to meet Articles 1116 and
19 1117.

20 PRESIDENT VEEDER: Not just those
21 Articles. It's the order on bifurcation.

1 MR. McNEILL: Yes.

2 PRESIDENT VEEDER: We are not dealing with
3 quantum at this stage.

4 MR. McNEILL: That's correct.

5 PRESIDENT VEEDER: Whether it's \$1 or a
6 billion dollars, that would be a quantum issue,
7 would it not, which we wouldn't be required to
8 address at this stage, but if you could show there
9 was no loss at all, then we can see where you're
10 going.

11 MR. McNEILL: That's exactly correct. We
12 are saying the claimant must establish the fact of
13 loss, even if it does not quantify that loss in
14 detail. And we think that's what the applicable
15 case law shows, and it shows that failure to
16 produce any evidence that there has been actual
17 loss requires dismissal of the claim.

18 ARBITRATOR ROWLEY: Can I stop you there.
19 I have to admit, I have a bit of difficulty when
20 we've bifurcated. Let us assume that Methanex gets
21 through the jurisdictional hurdle and succeeds in

1 showing there has been a breach of 1102, 1105, or
2 1110, and that there is the possibility of
3 establishing loss. Surely, the determination of
4 whether there has been loss is for the quantum
5 stage and not now.

6 MR. McNEILL: I would respectfully
7 disagree. I believe the text of 1116, 1117 says
8 that, as an element a claim, as an element of the
9 cause of action, the claimant must establish that
10 it has incurred a loss or damage, and I believe
11 that goes to the fact of whether there is a loss as
12 opposed to the quantum of that loss.

13 PRESIDENT VEEDER: Your argument which
14 you're about to pursue, as you did at this hearing
15 is that there has been no loss at all?

16 MR. McNEILL: It's a little different than
17 that, actually. It's that there is no evidence in
18 the record of any loss. And so, really, my
19 presentation is a review of the evidentiary record,
20 and then we discuss why it's credible that there is
21 no loss here because there is lots of facts would

1 show that there is no loss, but primarily we are
2 discussing the evidentiary record here.

3 PRESIDENT VEEDER: Thank you. Please
4 proceed.

5 MR. McNEILL: Now, I'm going to--as I
6 said, I'm going to briefly review the evidentiary
7 record with respect to three main categories of
8 claims, Methanex's claims with respect to its
9 Fortier plant, its claims with respect to its
10 market share in California, and its claims with
11 respect to its stock price and its long-term credit
12 rating.

13 Now, it doesn't take very long to review
14 the evidentiary record with respect to
15 Methanex-Fortier. This is all there is. This
16 is--and I'm referring to a single page from
17 Methanex's 2002 annual report, this 19 JS tab 2.
18 Methanex relies on a single line from this single
19 page as its only evidence of any loss to
20 Methanex-Fortier, and I will read to you--I will
21 back up a couple of lines to give you more context

1 and I'll read from that page.

2 At the United States Federal Government
3 level, there have been proposals to ban MTBE.
4 However, to date, no legislation has been passed.
5 We believe it is likely, however, that over time
6 the demand for methanol--for MTBE consumed in the
7 United States will be reduced or possibly
8 eliminated as a result of these developments.
9 Limiting or eliminating the use of MTBE in gasoline
10 in California or more broadly in the United States
11 will reduce demand for MTBE and methanol in the
12 United States and negatively impact the viability
13 of MTBE in methanol plants, such as our Fortier
14 plant in the United States.

15 Now, you will note that this refers to the
16 possibility of the loss of MTBE market across the
17 entire United States, and we, as we discussed
18 yesterday, Fortier did not participate in the
19 California market. It only served its regional
20 market. So--and this is phrased in the future
21 tense, so what it's really getting at is the

1 possibility that either Federal legislation or
2 legislation enacted by states in the region near
3 Fortier in the market that Fortier once served
4 could possibly affect Fortier's business, if it
5 were to be reopened. And that, we submit, is not
6 evidence of an existing loss or damage that is
7 required under 1116 or 1117, no matter what
8 standard was applied.

9 Now, yesterday Professor Reisman asked
10 Methanex how Fortier--how the Fortier plant could
11 have affected--could have been affected when it had
12 a segmented customer base, and Methanex's response
13 was the California ban did not injure the Fortier
14 present directly, but rather affected the plant
15 through the global market, and that's yesterday's
16 transcript at page 2000, line 18, to page 2001,
17 line 1.

18 Now, how does that assertion affect this
19 piece of evidence? Methanex's single page from its
20 2002 annual report. This page contemplates a
21 direct injury through the potential loss of

1 customers, not an indirect injury through the
2 global marketplace because Methanex concedes there
3 is no direct effect through the loss of customers.
4 This evidence, by Methanex's own admission, is of
5 no evidentiary value.

6 Now, let's take a closer look at
7 Methanex's global market claim with respect to the
8 Fortier plant. Of course, we have no contemporary
9 documents to look at because this claim is based on
10 pure speculation. Methanex asks the Tribunal to
11 make two very big assumptions. First, that the ban
12 had a significant impact on the global methanol
13 price; and second, that the global methanol price
14 in the absence of the ban, would have been so high
15 that it would have made the Fortier plant
16 profitable.

17 First of all, there is no expert testimony
18 or any other evidence in the record that the
19 California ban had any effect on the global market
20 price for methanol. All we have is Methanex's
21 admission that it did not see, quote, much of an

1 impact on pricing, if any at all, end quote. And
2 that's a quote we have seen before at 18 JS 2659.

3 We also know that the global methanol
4 price increased from around a hundred dollars in
5 1999 to around \$220 in 2003. But, of course,
6 Mexican contends that no matter how high the
7 methanol price was, if it were just a little bit
8 higher in the absence of the ban, the Fortier plant
9 would have been profitable. And that contention,
10 we submit, is implausible. We know that
11 Methanex-Fortier was, quote, hurting, unquote,
12 economically in 1999 with natural gas costs at a
13 little over \$2 per a million BTUs. Methanex does
14 not deny this.

15 We know Fortier's natural gas costs rose
16 the following year to over \$6. Methanex does not
17 deny that. How the California ban could have been
18 responsible for an impact on methanol pricing
19 sufficient to offset the nearly tripling in
20 Methanex's input costs is not even explained. It
21 goes without saying that it has not been proven.

1 And as we noted last week, it seems highly
2 unlikely that Methanex would have contradicted its
3 own widely touted company goals of reducing costs
4 by shifting its production offshore, out of the
5 expensive North American market, and that it would
6 have reopened the Fortier plant which produced
7 methanol at \$6--at natural gas it was \$6 instead of
8 producing natural gas at fifty cents or a dollar in
9 Chile or Trinidad. Methanex has no explanation for
10 this.

11 Finally, what I would like to make clear
12 to the Tribunal is that Methanex's claim with
13 respect to the Fortier facility is based on
14 Methanex's subjective reasons for keeping the plant
15 closed. Methanex claims that it was the California
16 ban that caused it to decide to keep the plant
17 closed. Of course, we can never know what
18 Methanex's subjective motivation was with respect
19 to the Fortier plant because Methanex has never
20 produced any contemporaneous evidence from its
21 files.

1 MR. DUGAN: Could I just object to that
2 point. There is the Macdonald affidavit which is
3 precisely on that point. You keep saying that
4 there is no evidence, and that's simply not true.
5 I mean--

6 MR. McNEILL: Well, Mr. Dugan raises an
7 excellent point because throughout these
8 proceedings Methanex has been claiming that its
9 witness statements from its corporate officers is,
10 quote, evidence, and we think that is just simply
11 not the case. That is a statement, but it is not
12 contemporaneous evidence from its files, and there
13 is a big difference.

14 I will draw your attention to the Avco
15 case, it's Iran-U.S. Claims Tribunal case. It's in
16 the record at 1 U.S. Statement of Defense Tab 9,
17 and in that case the claimant sought to produce
18 evidence of what it called its work-in-progress
19 inventory.

20 ARBITRATOR REISMAN: What was the name of
21 the case?

1 MR. McNEILL: It's Avco, A-V-C-O, Corp.
2 versus Iran, and it's a 1989 case.

3 In that case, the claimant sought to prove
4 that there was some injury to what it called its
5 work-in-progress inventory, which it defined as its
6 costs incurred for material, labor, and overhead,
7 as well as profits. And in support of this
8 allegation, it supplied affidavits from two
9 corporate officers, and I'm referring to page 209
10 of that case.

11 Paragraph 38 of that case, and I will read
12 that to you, Avco has produced only the testimony
13 of its officers to prove this claim. No
14 documentary evidence has been submitted by Avco to
15 show that the amount claimed constitutes its actual
16 unmitigatable losses following IACI's breach. No
17 evidentiary basis has been provided to allow the
18 Tribunal to make a reasonable estimate of damages.
19 Therefore, without deciding whether Avco would have
20 been entitled to recover, had it proven its losses,
21 the Tribunal dismisses this portion of the claims

1 for lack of proof.

2 In other words, what you have there is a
3 claimant who tried to prove allegations simply
4 through statements of its corporate officers
5 without any contemporaneous evidence, and that's
6 clearly what Methanex is trying to do here, and we
7 submit that that is not sufficient to meet its
8 evidentiary burden.

9 ARBITRATOR ROWLEY: Would that point apply
10 also to the proof of ownership?

11 MR. McNEILL: I believe I will let my
12 colleague, Jennifer Toole, address that issue.

13 So to get back to the Fortier, the claims
14 with respect to the Fortier plant, as I said, the
15 issue really is one of their subjective motivation
16 for keeping the plant closed or opening it, and
17 when you have a major corporate decision like this,
18 you would expect to see, you'd expect to see market
19 studies, meeting notes, memoranda, perhaps some
20 E-mails. You would expect to see some
21 contemporaneous evidence of such a major corporate

1 decision, and Methanex has produced nothing.
2 Methanex has only produced this, a single page from
3 this 2002 annual report, which we submit is not
4 competent evidence under Articles 1116 and 1117.

5 I would like to turn my attention to
6 Methanex's claim with respect to its loss of the
7 California market or its loss of market share. And
8 I will begin by addressing a question raised by
9 Professor Reisman yesterday, who asked whether
10 Methanex's exports to the U.S. market qualify as an
11 investment under Chapter 11 simply because Methanex
12 has a marketing office in Texas. And the
13 transcript reference is page 2002, lines 16 and
14 following.

15 The answer to that question, we submit S
16 clearly no. Methanex's marketing office does not
17 transform its trade claim into an investment claim.
18 Cross-border trade in goods is addressed in parts
19 two and three of the NAFTA. Chapter 11, which is
20 in part five, is for claims with respect to
21 investments.

1 Now, Methanex asserted yesterday that it
2 is free to pick and choose between these Chapters.
3 That is not the case. Investments are defined in
4 Article 1139, and that Article expressly excludes
5 cross-border trade in goods from the ambit of
6 Chapter 11. Let me read to you from that provision
7 of the NAFTA. If you have the same copy I do, it's
8 on page 277, right about the middle of the page.
9 It says (reading), Investment does not mean claims
10 to money that arise solely from commercial
11 contracts for the sale of goods or services by a
12 national or enterprise in the territory of a party
13 to an enterprise in the territory of another party,
14 if I read that correctly.

15 Now, that's exactly what we have here.
16 Methanex has offered as evidence of its loss of
17 market share its contract, its unsigned contract
18 with the Valero as evidence that it lost a valuable
19 market, and that's exactly what we are looking at.
20 The commercial contract for the sale of goods, and
21 that's really what this case is about.

1 Now, in response to Professor Reisman's
2 question, Methanex said that it has valuable U.S.
3 assets or valuable assets in the United States, I
4 should say, that it leases rail cars, and it leases
5 or owns storage depots, and that's transcript at
6 page 2004, line 20.

7 And Methanex also notes that it has
8 customer lists that it purchased in 2002. But
9 Methanex's claim in this case is not with respect
10 to those items. It is not with respect to its
11 rail cars. It is not with respect to its storage
12 depots, and it cannot be with respect to customer
13 lists that it purchased years after the ban was
14 announced. Rather, stripped of this rhetoric of
15 market access, Methanex's claims are with respect
16 to its revenues, and those revenues are based on
17 Methanex's exports from Canada to California.

18 So, you see this case is really a
19 cross-border trade case masquerading as an
20 investment case. Once the Fortier plant was closed
21 down before the ban was even announced, Methanex

1 had no manufacturing base in the United States.
2 All of its sales in the United States were exports.
3 It was strictly an exporter, and it simply had a
4 marketing operation in Texas.

5 Now, if the Tribunal knew nothing else
6 about this case except those facts, it could, and
7 should, dismiss Methanex's claims as outside the
8 scope of its jurisdiction under Chapter 11.

9 I will turn my attention to Methanex's
10 claim with respect to its stock price and its debt
11 rating. As I noted last week, Methanex expressly
12 represented in this case that its, quote, damage
13 claim is not based on a loss of share value,
14 unquote. Yesterday, we heard Methanex say that,
15 quote, We are involved in a proceeding where we
16 hope to recover not for the damage, not for the
17 decrease in share price. Our calculation of
18 damages is not based on the decrease in share
19 price. And that's yesterday's transcript at page
20 1981, line 19, to page 1982, line 2.

21 Now, I confess I'm somewhat confused by

1 the precise status of Methanex's stock claim. It
2 is unclear why we are even discussing stock price
3 movements at all when Methanex itself says that the
4 injuries for which it hopes to recover are
5 unrelated to the stock price.

6 ARBITRATOR ROWLEY: I think, as I
7 understand it, they're saying we are not measuring
8 our loss by the change in value of the--or the
9 change in price of stock at any one day. They're
10 saying that the measures in question detrimentally
11 affected the company, as a result of which the
12 stock price was negatively impacted, and one
13 consequence of that was that we had a downward
14 rating of our credit, and that is a damage to the
15 company. They're not putting forward any evidence
16 as to the amount of damage, reserving that for the
17 damage phase, but saying the impact on the stock
18 was an impact, was a damage to the company.

19 MR. McNEILL: Yes, I understand, and
20 again, we don't believe this is an issue of quantum
21 of damages. We believe this is an issue about

1 whether there is factual damages, and more
2 importantly, whether, as a legal matter, Methanex
3 has standing to assert a claim based solely on a
4 diminution in the price of its shares.

5 Now, what's really important here is the
6 timing, okay, because they're alleging claims in
7 early 1999, in February and March 1999. This is
8 years before anyone in this case has alleged that
9 there was any effects from the ban at all. There
10 was no effects from the ban.

11 So, in other words, there was no actual
12 injury to the corporation itself. There wasn't
13 any--there wasn't any injury to its assets. There
14 wasn't any harm to the corporation itself. It was
15 merely, at best, to the extent you can attribute a
16 temporary decline in stock price to a ban that
17 would be implemented years in the future. To the
18 extent you could connect those two things, it
19 reflects, at best, concern in the minds of some
20 shareholders that there might be some future effect
21 on the profitability of the corporation. And that

1 is not a claim that the corporation can assert.

2 Now, Methanex submitted a batch of new

3 authorities last night, and as a housekeeping

4 matter we formally withdraw our objection to the

5 submission of those legal authorities during the

6 claimant's closing and agree that the parties may

7 always make reference to new legal authorities.

8 But we are very surprised after four years of

9 discussing stock price that they produced six new

10 authorities on this topic. However, those cases

11 are irrelevant, and they're irrelevant for the

12 exact reason I have been telling you. Those cases

13 stand, at best, they suggest that a corporation may

14 have standing to bring a claim for an injury

15 directly to the corporation, not to the--not to a

16 diminution in value of the shares, but directly to

17 the corporation that may be reflected in the value

18 the shares. And those Articles all go to the

19 standing of the shareholders that do not have

20 standing for such a claim, but a corporation. If

21 the injury is directly to the corporation, then the

1 corporation has standing. And it may be reflected
2 in the stock price, but it cannot be based solely
3 on the stock price, and those authorities are quite
4 clear on that point. I'll note also--

5 PRESIDENT VEEDER: Forgive me, you've got
6 a copy of those authorities?

7 Mr. Dugan, have copies been supplied to
8 the Tribunal? In due course, if copies could be
9 supplied to the Tribunal, we'd be grateful.

10 MR. DUGAN: They have been supplied by
11 E-mail, and we will supply you with hard copy, as
12 well.

13 PRESIDENT VEEDER: Thank you very much.

14 MR. McNEILL: If the Tribunal cares to
15 review that authority, we are happy to review it.

16 PRESIDENT VEEDER: Please proceed for the
17 time being.

18 MR. McNEILL: Yesterday, Methanex also
19 sought to dispel the notion that its stock price
20 claim is a moving target. Well, its claim is a
21 moving target, and it continues to shift. It was

1 first stated as a 10 percent drop in the price of
2 its shares, and then it was a 20 percent drop, and
3 now Methanex alleges three different segments of
4 stock price movement that it tells us adds up to a
5 30 percent drop.

6 Now, what scientific method you might ask
7 did Methanex use to determine what days were
8 attributable to the ban and what days were not
9 attributable to the ban? And let's look at
10 Methanex's first period with respect to--the first
11 period it alleges.

12 Notice, Methanex has chosen, apparently
13 chosen the dates January 29th, 1999, to February
14 9th, 1999, as the period which can be attributed to
15 this future ban.

16 Now, you might ask where did Methanex come
17 up with those dates? The fact is that Methanex did
18 not come up with those dates.

19 ARBITRATOR REISMAN: I'm asking for the
20 reference to this chart.

21 MR. McNEILL: It was Tab 39 to Methanex's

1 exhibits yesterday.

2 I was saying you might ask where Methanex
3 got these dates. Well, the United States actually
4 first mentioned these dates in footnote 474 to its
5 Amended Statement of Defense. The United States
6 argued that Methanex's stock price was highly
7 volatile in this period, and the declines of
8 20 percent or more in a short period were not
9 uncommon.

10 Now, the United States could have chosen
11 any number of dates in 1998 or 1999 and happened to
12 select these particular dates.

13 What did Methanex do? It simply adopted
14 those exact dates as its new stock price claim.
15 This, we submit, illustrates the completely
16 arbitrary nature of Methanex's attempt to ascribe
17 short-term price swings to a future ban on MTBE.

18 And Methanex also asserted yesterday that
19 the mere fact that the stock price has recovered
20 far beyond its price in 1999, does not prove
21 anything. The supposed injury in 1999, says

1 Methanex, is somehow permanently embedded in
2 Methanex's stock price. And Methanex offers
3 nothing but speculation to support this bizarre and
4 illogical theory.

5 As I noted, at the time of the price stock
6 drops, Methanex, the corporation, had not suffered
7 any injury to the corporation. Rather, the
8 temporary drop in share price, to the extent you
9 could ascribe it at all to the ban, simply
10 reflected a concern in the minds of the
11 shareholders that there might be some future effect
12 on the corporation's profitability.

13 Now, Methanex has no explanation for why
14 such a temporary concern would be somehow
15 permanently fixed in the stock price today, but
16 Methanex's repeated assertions to its shareholders
17 that the ban will have no effect on the company's
18 business would not likely--would not likewise be
19 reflected in the share price.

20 Now, I will briefly address Methanex's
21 claims with respect to its debt rating. I will be

1 quite brief here. Yesterday, we heard no
2 explanation for why Methanex's own evidence
3 primarily attributes the downgrades in early 1999
4 to supply and demand factors that are unrelated to
5 the California ban.

6 More importantly, Methanex admitted
7 yesterday that there was no direct alarm because it
8 never actually issued any debt at any relevant
9 time. And that's the transcript at page 1986,
10 lines 12 through 15.

11 Methanex's new theory, as of yesterday, is
12 that it suffered, quote, reputational harm. We
13 submit that the mere allegation of some unspecified
14 reputational harm due to a temporary and minor
15 downgrade is not evidence of an actual existing
16 loss to the corporation, as required by Articles
17 1116 and 1117.

18 Finally, I will address Methanex's
19 claims--finally, I will address the admissions that
20 we looked at last week, and Methanex showed you
21 some of them yesterday. Methanex asserts that the

1 statements by its three corporate officers, the
2 statements that Methanex had not incurred any loss
3 or damage, were taken out of context. And their
4 full context, Methanex says, they really just refer
5 to short-term effects and not long-term effects.

6 In other words, Methanex concedes that in
7 the short term, the company has felt no impact from
8 the ban, but in the longer term, in the future, it
9 might feel some impact.

10 Now, I'm not going to go through these
11 statements again. The Tribunal has them in the
12 handout from last week and can read them and see
13 exactly what those statements mean in their
14 context. But I will comment on Methanex's
15 distinction between long-term and short-term
16 effects.

17 Now, Methanex made these admissions over
18 an 18-month period beginning in mid-2002. At each
19 juncture Methanex confirmed that it had not felt
20 any impact from the ban. In the first few
21 statements, Methanex held out the possibility that

1 there might be some future impact from the
2 California ban or possibly from a nationwide ban,
3 but as the California market was phased out, that
4 possibility of any future impact disappeared.

5 So, in mid-2003, when the relevant market
6 was virtually phased out, Methanex said that it was
7 no big deal, and in February of 2004, after the
8 relevant market had completely disappeared,
9 Methanex made an explicit statement that the
10 methanol industry has felt no impact at all. So,
11 in other words, the mere qualification in some of
12 these earlier statements that there was still some
13 possibility of a future effect, an effect that was
14 later confirmed not to have occurred, does not in
15 any way save Methanex from its admissions of no
16 loss.

17 And furthermore, all of the statements I
18 showed you confirm that Methanex did not have any
19 existing injury at the time it filed its claim in
20 1999.

21 And finally, we have demonstrated in our

1 oral and written submissions why it makes sense
2 that Methanex could tell its shareholders that it
3 was not affected by the ban. The market, as we
4 showed you, was actually a very small market for
5 Methanex, accounting for a few million dollars in
6 revenues, and the market was not profitable for
7 Methanex. Methanex has never denied this. During
8 the relevant period, Methanex was producing and
9 selling as much methanol as it possibly could, and
10 Mr. Macdonald himself states in his witness--in his
11 affidavit the sales would have gone to California
12 were simply shifted to other markets, so there
13 wasn't any net decrease in revenues. And certainly
14 there is no evidence of such.

15 Now, since Methanex is eager to show you
16 more context to these admissions, I'm going to show
17 you just two of the statements we looked at last
18 week that include an extra sentence or two that I
19 think sheds some light on why the loss of the
20 California MTBE market was not harmful to Methanex.

21 This first statement is from Methanex's

1 2002 fourth quarter earnings conference call, and
2 the statement is made by Methanex's CEO. It says,
3 "Clearly, in the market we are in today, if the
4 conversion in California took place overnight"--oh,
5 I'm sorry, I'm on the wrong one. Let me back up.
6 "Clearly, in the market we are in today,
7 if the conversion in California took place
8 overnight, it would be fully absorbed. It would
9 give some relief in terms of inventories in the
10 system, so overall, Tony"--Tony was an analyst that
11 Mr. Choquette was speaking to--"we haven't changed
12 our view, I mean very consistent. We still think
13 that what's going to happen in California can be
14 fully absorbed in terms of supply and demand."
15 Now, if we look at this other quotation,
16 again by Methanex's CEO, and this is from the
17 second quarter earnings conference call in 2002, it
18 says, quote, It just happens to be coming at a time
19 when it's unlikely to have any significant impact
20 because, my God, the, you know, when I do my own
21 calculations, I look at the impact of what might

1 happen in California over the next year. It gives
2 the industry a bit of breathing room and
3 opportunity to replenish our inventories.

4 Now, you can see from these statements
5 that Methanex was actually suggesting that there
6 might be some benefits from the ban, and that might
7 seem counterintuitive, but in the context of what
8 was happening in the market at that time it makes
9 perfect sense. After 2000, the methanol market
10 entered a period of severe undersupply. Methanex
11 in particular, for a number of reasons, was
12 struggling to meet its contractual commitments and
13 maintain its sinking inventory levels. In fact, as
14 we demonstrated, to me it's contractual
15 commitments, methanol had had to buy--Methanex had
16 to buy methanol from third parties at a loss.

17 And for that reason, the loss of some
18 demand in California actually provided some welcome
19 relief to Methanex.

20 So, the notion that the statements in
21 their totality shows something other than Methanex

1 sustains no loss or injury from the ban is not
2 true. Those statements are perfectly clear in
3 their context, and in the context of what was
4 happening in the methanol market at that time.

5 To conclude my remarks, you can see that
6 Methanex has submitted no evidence of any existing
7 loss or damage. Methanex's single line from its
8 2002 annual report is not evidence of an actual
9 existing loss to the corporation that is
10 attributable to California, to the California ban.
11 Its claims with respect to exports do not belong
12 under the investment chapter at all and are, in any
13 event, uncorroborated by any actual evidence. And
14 its stock price and debt rating claims are legally
15 and factually without merit.

16 For these reasons and the reasons we have
17 set forth in our oral and written submissions, we
18 respectfully suggest that Methanex's claim must be
19 dismissed in its entirety.

20 That concludes my remarks. I'm happy to
21 take any questions. Otherwise, I would suggest we

1 turn the floor over to my colleague, Ms. Menaker.

2 PRESIDENT VEEDER: Thank you, Mr. McNeill.

3 We have no questions at this stage.

4 Ms. Menaker.

5 MS. MENAKER: Thank you, Mr. President,
6 members of the Tribunal. I will now respond to the
7 points that Methanex made yesterday regarding its
8 national treatment claim. As we demonstrated in
9 our written submissions and in our opening,
10 Methanex cannot make out a national treatment claim
11 under the clear terms of Article 1102. Methanex
12 has not disputed that it and its investments were
13 treated no less favorably than U.S. investors and
14 U.S. investments, U.S.-owned investments in
15 precisely the same circumstances as it.

16 In response, Methanex argued yesterday
17 that Article 1102 not only addresses discrimination
18 against investors and investments on account of
19 nationality, but also prohibits, and I quote,
20 favoritism and economic protectionism, end quote.
21 Methanex has cited no support for this novel

1 proposition.

2 The United States has demonstrated that
3 Article 1102's objective is to prohibit
4 discrimination on the basis of nationality. The
5 United States has also showed that the best way to
6 determine whether there has been discrimination on
7 the basis of nationality is to control for all
8 factors other than nationality. In other words, it
9 best serves Article 1102's purpose if one compares
10 the foreign-owned investor and investments to
11 comparators, domestic comparators, that are similar
12 in all relevant respects but for nationality.

13 Methanex has not responded to this
14 analysis or to the authorities that the United
15 States cited in support of this analysis.

16 Methanex's argument that ethanol producers
17 were treated better than methanol producers cannot
18 form the basis for a national treatment claim.
19 Investors and investments in the ethanol industry
20 are not in like circumstances with investors and
21 investments in the methanol industry.

1 Yesterday, Methanex renewed its criticism
2 of the NAFTA parties' agreement that WTO
3 jurisprudence should not be relied upon in
4 interpreting Article 1102. Methanex argued that
5 such an agreement was at odds with Article 1131,
6 and in essence amounted to an amendment of that
7 Article.

8 Methanex's argument, if I understand it,
9 is that because Article 1131 refers to
10 international law as the law that should govern the
11 interpretation of the Article, in addition to the
12 provisions of the NAFTA itself, and because the WTO
13 agreements are international law, those agreements
14 necessarily apply when interpreting Article 1102.
15 Such an interpretation, we submit, is absurd.

16 Article 1131 provides that governing law
17 in a Chapter 11 dispute is the NAFTA itself and
18 applicable rules of international law. And, yes,
19 the WTO agreements constitute international law for
20 the parties to those agreements. So does the
21 Antarctic Treaty. I don't think that even Methanex

1 would argue that because the Antarctic Treaty is
2 international law, a Chapter 11 Tribunal should
3 apply its provisions or jurisprudence in
4 interpreting that agreement when interpreting
5 Article 1102. The issue here is whether WTO
6 jurisprudence is applicable law for purposes of
7 Chapter 11, national treatment claims.

8 The NAFTA parties agree that WTO
9 jurisprudence is not applicable law for these
10 purposes. The WTO is a different international
11 treaty. The language in the provision that
12 Methanex relies on is different from the language
13 in Article 1102, and the object and purpose of the
14 Treaties differ. And I would direct the Tribunal
15 to a discussion of these issues in the OSPAR
16 Convention case, which is useful on this point.

17 I won't repeat here what I've said about
18 the impropriety of placing the burden on the United
19 States to justify the ban. Methanex yesterday
20 argued that the question of an environmental
21 justification is usually regarded as an exception

1 to a national treatment claim and is not taken into
2 account at the stage when determining whether
3 products are like under a WTO analysis or, I
4 suppose, similarly, when investments or investors
5 are in like circumstances with one another.

6 In our opening, I pointed to an authority,
7 specifically the asbestos case before the WTO
8 appellate body, and the WTO context, and the S.D.
9 Myers case that interpreted the term "in like
10 circumstances" in the national treatment context
11 and showed that this was not the case. In both of
12 those cases the WTO appellate body considered
13 environmental impacts and health impacts of the
14 products at issue when determining whether those
15 products were like. It, in fact, reversed the
16 panel decision on the grounds that the panel had
17 improperly waited until it got to the exception
18 phase to determine whether or not an exception
19 applied. It said that ought to have been part of
20 its analysis in determining whether the products
21 were like.

1 And similarly, the S.D. Myers Tribunal
2 also recognized that the environmental impacts of
3 an investment can be taken into account when
4 determining whether those investments are in like
5 circumstances with one another.

6 Methanex has simply restated its argument
7 without any supporting authority or without
8 discussing these authorities proposed by the United
9 States. The United States has also demonstrated
10 that even if WTO jurisprudence were applied, it
11 would result in a finding that ethanol and methanol
12 were not like products, and I won't go through that
13 entire analysis again here, but instead I will
14 respond to the two points in the analysis with
15 which Methanex expressed disagreement yesterday.

16 First, Methanex argued that methanol and
17 ethanol have the same end use. As we have
18 demonstrated, the evidence does not support such a
19 finding. Ethanol is used as an oxygenate additive
20 in gasoline. Methanol is not, and cannot be,
21 legally or practically used as an oxygenate

1 additive. The end uses of the products are not the
2 same.

3 Now second, Methanex took issue with the
4 United States's analysis of the third factor
5 concerning consumer tastes and preferences.
6 Methanex argued yesterday that contrary to the
7 evidence that has been adduced by the United
8 States, ethanol was, indeed, much worse for the air
9 and the water than MTBE, or methanol.

10 As a preliminary matter, Methanex confused
11 the analysis by equating MTBE and methanol and
12 comparing them to ethanol rather than comparing
13 MTBE to ethanol or methanol to ethanol. But more
14 importantly, Methanex's argument does not support
15 it.

16 Assume that everything that Methanex said
17 yesterday about consumer preferences is true; that
18 consumers, indeed, prefer MTBE and methanol over
19 ethanol, because ethanol is allegedly much worse
20 for the environment and for human health. Now,
21 that would support the conclusion that ethanol and

1 methanol are not like and that methanol and ethanol
2 are not like. They are different. That is why
3 consumers distinguish between them. Whether they
4 prefer one or the over the other isn't the point.
5 The point is that they are not perceived as being
6 interchangeable. Consequently, they're not like
7 and would not be considered like products.

8 So even under Methanex's version of the
9 facts, MTBE and ethanol would not be considered
10 like products, nor would methanol and ethanol be
11 considered like products. And there is no reason
12 to suggest that producers and marketers of MTBE and
13 ethanol should be considered to be in like
14 circumstances with one another, either, for the
15 same reasons there is no reason to suggest that
16 producers and marketers of methanol should be
17 considered to be in like circumstances with
18 producers and marketers of ethanol.

19 For all of the reasons that we've stated
20 in our written and oral submissions, Methanex has
21 not shown that it or its investments have received

1 any less favorable treatment. Even under its own
2 test, it cannot show that it or its investments
3 have been a victim of economic protectionism or
4 favoritism. In any event, Methanex's construction
5 of Article 1102 as prohibiting economic
6 protectionism and favoritism cannot be squared with
7 the NAFTA's provisions. Forms of economic
8 protectionism and favoritism are explicitly carved
9 out from the ambit of Article 1102. Subsidies, for
10 example, are a prime example of favoritism. It is
11 the United States's demonstrated under the clear
12 terms of Article 1108, subparagraphs 7-B the
13 granting of subsidies can't form the basis for a
14 national treatment claim.

15 Tariffs are a prime example of a form of
16 economic protectionism. Tariffs, however, cannot
17 be challenged under Chapter 11. Methanex's newest
18 iteration of its national treatment test finds no
19 support in the language or purpose of Article 1102.
20 The United States respectfully requests that
21 Methanex's national treatment claim be dismissed.

1 PRESIDENT VEEDER: Thank you, Ms. Menaker.

2 MR. LEGUM: If there are no questions from
3 the Tribunal, we would suggest taking a 10-minute
4 break and then returning for the conclusion of the
5 United States's presentation.

6 PRESIDENT VEEDER: Let's take a 10-minute
7 break now. Thank you.

8 (Brief recess.)

9 PRESIDENT VEEDER: Let's resume.

10 MR. LEGUM: I would like to begin by
11 answering some of the questions that have been
12 asked. First of all, the reference that the
13 President asked for for the transcript on day two
14 when I mentioned the statement of reasons for the
15 conditional prohibition of the 11 compounds is two,
16 that's two meaning day two, transcript page, 327,
17 lines 5 through 21.

18 Second, in response to Mr. Rowley's
19 question concerning the waivers in this case, there
20 have been many claims and many waivers, and it took
21 me a while to remember that with Methanex's Second

1 Amended Statement of Claim that the back of that,
2 tab F, at the very back of that, it sets forth the
3 latest waiver that we have received, and the
4 operative text of that is that Methanex waives its
5 rights to initiate or continue, dot, dot, dot, any
6 proceedings with respect to any measure that the
7 claimant/investor alleges to be a breach of NAFTA
8 referred to in Articles 1116 and 1117.

9 So the question then arises what are the
10 measures that have been alleged to be a breach? As
11 I outlined in my presentation, it is unclear from
12 the Second Amended Statement of Claim whether the
13 conditional prohibition was asserted to be a
14 breach, the United States objected on that basis,
15 and Methanex then advised that that was not a
16 measure that Methanex was claiming to be a breach
17 of the NAFTA. I'm referring to the Methanex
18 Response to the U.S. Supplemental Statement of
19 Defense of March 26, 2003. On that basis,
20 therefore, we contend that this waiver does not
21 cover the conditional prohibition.

1 PRESIDENT VEEDER: Another factor involved
2 with that waiver was the subject of an agreement
3 between the parties recorded by letter dated the
4 13th of July, 2001, and we referred to that
5 agreement and set it out in paragraph 93, page 35
6 of the Partial Award.

7 And the relevant paragraph may be
8 paragraph three. I will read it out for the
9 record. "The parties agree that waivers complying
10 with the requirements of Article 1121 must be
11 submitted as provided in Article 1137 in order for
12 a claim under Chapter 11 of the NAFTA to be
13 considered submitted to arbitration and jointly
14 request that the Tribunal note this agreement in
15 its decision on the United States's preliminary
16 objections."

17 That's the end of the quote.

18 MR. LEGUM: Yes.

19 And, of course, these waivers postdate, or
20 do they, actually?

21 PRESIDENT VEEDER: The waiver you've just

1 read is, I think, dated May the 22nd or 25th, 2001,
2 so it is, I think, the waiver which is the subject
3 of the parties' agreement, but if I'm wrong about
4 that, we would like to be corrected.

5 MR. LEGUM: That is correct, I believe.

6 And so this waiver predates the Second Amended
7 Statement of Claim, and therefore, the measures
8 that were claimed to be a breach at the time of
9 that waiver were the measures that were asserted in
10 the then-Draft Amended Statement of Claim which was
11 accepted by the Tribunal as the Amended Statement
12 of Claim.

13 I believe that Ms. Menaker, unless there
14 is any questions on that subject, Ms. Menaker has
15 at least a partial response on one of the questions
16 that was requested.

17 PRESIDENT VEEDER: Ms. Menaker.

18 MS. MENAKER: Thank you. I just wanted to
19 get back to the Tribunal with some information
20 regarding the campaign disclosure requirements for
21 things such as dinners, and I would just emphasize

1 that, of course, Methanex has acknowledged that all
2 of the U.S. campaign finance laws have been
3 complied with and has produced no evidence that it
4 was necessary to disclose this or that it wasn't
5 disclosed. But nevertheless since the Tribunal has
6 indicated an interest, the information that I've
7 learned is that the form that is in evidence is a
8 Form 490, which is used for--to record campaign
9 contributions. When a candidate or an official
10 accepts a dinner that is not reported on that form,
11 it is considered to be a gift of food for the
12 official, and is reported on a Form 700, which is
13 filed with the Fair Political Practices Commission.
14 So, it's filed in a different state agency, and I
15 do have a number of code sections, if the Tribunal
16 is interested, although they're obviously not in
17 the record because this hasn't come up before now.

18 PRESIDENT VEEDER: When you referred to
19 the form, is that the form that we saw yesterday in
20 the Methanex closing documentation or a form that
21 is not before us?

1 MS. MENAKER: It's a form that is not
2 before you.

3 PRESIDENT VEEDER: We were shown a form
4 yesterday in relation to another dinner that had
5 been disclosed.

6 MS. MENAKER: That's right.

7 PRESIDENT VEEDER: Can you just help us
8 identify that document.

9 MS. MENAKER: Yes, that was on 16 JS tab
10 28 at page 1257.

11 And there are--I should also mention that
12 there is a \$50 minimum under which they don't need
13 to be made disclosed, but the issue would also
14 arise as to whether it was a gift of food for the
15 individual official, in which case it's just
16 considered a gift to that political official, or
17 whether it was considered a political contribution
18 to his campaign.

19 Now, the one that is disclosed on that
20 Form 490 is for something around \$480.

21 PRESIDENT VEEDER: This was, I think, the

1 document at Tab 7 of Mr. Dugan's closing statement
2 bundle, and that was dinner costs for Mr. Cox.

3 MS. MENAKER: By a Mr. Jack Cox, yes, and
4 it was in the range of \$480 I believe.

5 And there it is unclear if that was, for
6 instance, a--I'm not sure if I have the terminology
7 correct, but essentially if it was part of a
8 donation to his campaign, for instance, if it was
9 part of a number of individuals were there, and it
10 is delegated to his campaign rather than as a gift
11 of food to the individual, and to be quite honest,
12 I mean, I don't practice in the area of campaign
13 finance law. It is highly regulated, and I don't
14 know the precise discrepancy of when it needs to be
15 on the Form 490 and when it needs to be on the Form
16 700, but I have been informed that typically gifts
17 of food which is just a meal is reported on this
18 Form 700, which is filed with the Fair Political
19 Practices Commission, and that there is a \$50
20 minimum level under which they don't need to be
21 reported, but that is the information that I've

1 learned on the subject.

2 PRESIDENT VEEDER: Thank you very much.

3 MS. MENAKER: You're welcome.

4 MS. GUYMON: Mr. President, members of the
5 Tribunal, it's a pleasure to address you again on
6 Article 1105(1), the minimum standard of treatment.

7 Methanex's current agreements regarding
8 Article 1105(1) suffer from two main flaws. First,
9 Methanex now asserts a variety of Article 1105(1)
10 claims that are nowhere to be found in its Second
11 Amended Statement of Claim, which is the operative
12 pleading in this case.

13 Second, Methanex misreads the passage it
14 provided from the waste management decision, and
15 Methanex compounds this second flaw by proffering
16 that passage as a definitive statement on the
17 meaning of Article 1105(1) to be applied no matter
18 what the facts in a particular case, and no matter
19 what actual state practice reveals to be the
20 current content of international law's minimum
21 standard of treatment.

1 I will address each of these fatal flaws
2 in turn.

3 First, I would ask the Tribunal if it
4 still has the Second Amended Statement of Claim
5 handy to turn its attention to Methanex's Article
6 1105 claim as it was stated in its entirety. It
7 can be found at page 128 of that pleading, and I
8 also have it up on the screen. It's the section
9 with the bold caption B, the California measures
10 violate Article 1105. And as can you see, it takes
11 up about half a page. That's the entire claim.

12 In the first paragraph, Methanex claims
13 that, quote, The California measures were intended
14 to discriminate against foreign investors and their
15 investments, and intentional discrimination is, by
16 definition, unfair and inequitable, unquote.

17 In the second paragraph, 314, Methanex
18 quotes from the S.D. Myers Partial Award, which was
19 rendered before the FTC interpretation came out.

20 In the third paragraph, Methanex asserts
21 without elaboration that, quote, This is a

1 straightforward case of raw economic protectionism.
2 On such facts the United States' breach of Article
3 1102 establishes a breach of Article 1105 as well,
4 end quote. Again, the internal quotes in there are
5 coming from the S.D. Myers Partial Award.

6 That is their claim in its entirety. The
7 United States thoroughly addressed this 1105(1)
8 claim in its amended statement of defense and in
9 its rejoinder. I will not repeat those arguments
10 again today, but suffice it to say that we
11 thoroughly demonstrated why this 1105 claim, as
12 pleaded, must fail.

13 Methanex has retained its claim of
14 discrimination, which was basically the entirety of
15 its claim as pleaded, according to the argument we
16 heard yesterday, and specifically in the transcript
17 at page 1941, lines 7 to 8, that was made clear.
18 Methanex asserts that, quote, Some forms of
19 discrimination are, indeed, illegal under
20 international law. That's at page 1941, page lines
21 13 through 15, but Methanex does not attempt to

1 identify what norms of discrimination are illegal,
2 other than to state that, quote, The type of
3 discrimination that Methanex faced in California at
4 the hands of Gray Davis is precisely that type of
5 discrimination. That is illegal under the fair and
6 equitable treatment standards, end quote.

7 State practice does not support this view,
8 and Methanex cannot cite any authority in its
9 support. But aside from its discrimination claim
10 which we are familiar with and were familiar with
11 before these hearings commenced, Methanex has now
12 added a host of new claims under Article 1105(1).
13 There were at least three new claims in Methanex's
14 argument yesterday that I would like to point out
15 for the Tribunal.

16 First, Methanex now asserts that a
17 political system in which campaign contributions
18 affect the outcome of policymaking decisions is
19 unfair and inequitable, arbitrary and unjust.
20 That's from the transcript at 1878, lines 2 to 14.

21 Second, and perhaps in elaboration of the

1 first point, Methanex adds that, quote, Whenever a
2 political official in implicit return for a
3 political contributions favors one competitor and
4 shuts another competitor out of the market, that's
5 arbitrary, grossly unfair, unjust, and
6 idiosyncratic, end quote. And that's from page
7 1940, line 18 to 1941, line 2.

8 Third, Methanex, in its opening oral
9 submission, as well as yesterday, advances as an
10 1105 claim the allegation that there was a complete
11 lack of transparency and candor in the
12 administrative process when Governor Davis banned
13 MTBE and shifted to ethanol, and that's page 1944,
14 line 19 through 1945, line 5.

15 Looking at what we have on the screen and
16 what Methanex pleaded in its Second Amended
17 Statement of Claim, I cannot find these particular
18 Article 1105(1) claims anywhere. They're not
19 properly before the Tribunal now.

20 The first of these three new claims is so
21 far-reaching it seems to take on the entire

1 campaign finance system in the United States.
2 After invoking U.S. politician statements decrying
3 the current campaign finance situation, Methanex
4 stated yesterday, and I quote, page 1878, lines 10
5 to 12, and one of the questions for the
6 Tribunal--for this Tribunal to decide is, is that
7 unfair and inequitable? And we submit that it is.
8 Methanex asks this Tribunal to decide whether the
9 United States' campaign finance system is unfair
10 and inequitable. The United States submits that
11 this question is not one for this Tribunal to
12 decide because it was never advanced in Methanex's
13 written pleadings.

14 Even if these new theories under Article
15 1105(1) were considered, their failings are readily
16 apparent. Methanex has provided no legal authority
17 showing that these supposed principles of
18 international law exist or have any application to
19 these facts. And it has failed to meet its burden
20 of proving the facts to show the alleged corruption
21 on which its claims depend.

1 Where do these new claims and new legal
2 theories come from? A passage from the waste
3 management award, which came out recently, that
4 leads me to the second flaw in Methanex's current
5 iteration of its Article 1105 claim. It's
6 misplaced reliance on a snippet from the waste
7 management award which it has wrested out of
8 context and misinterpreted.

9 Methanex places far more weight on this
10 snippet than it can possibly bear. Methanex
11 asserts that this is the singular statement on the
12 present state of the customary international law
13 standard of fair and equitable treatment. It does
14 so at page 1939, lines 3 through 5 in the
15 transcript. When asked to identify a source for
16 its proposition that customary international law
17 prohibits discrimination, Methanex admitted that it
18 had no source other than this paragraph in the
19 waste management award. That's at page 1944, lines
20 2 to 5 in the transcript. Methanex misconstrues
21 this paragraph. Methanex's counsel even admitted,

1 when asked, that he was, quote, not quite sure how
2 that paragraph articulated the link between its
3 articulation and customary international law, and
4 whether it or whether the Award fully accepted the
5 FTC interpretation that it was wholly dependent on
6 customary international law. That's at page 1942,
7 lines 15 to 20.

8 But all we need to do to discover whether
9 the waste management award accepted the FTC
10 interpretation is to read the full discussion of
11 Article 1105 in the waste management award. Doing
12 so shows that the Award, indeed, accepted the FTC
13 interpretation. The Award also did not profess, as
14 Methanex insists, that it alone provides the
15 authoritative articulation of the fair and
16 equitable standard. Rather, the waste management
17 Tribunal looked first at the text of Article 1105
18 and then at the FTC interpretation as its next
19 step. Then it turns to other tribunals'
20 discussions of Article 1105(1) in the Mondev, ADF,
21 S.D. Myers, and Loewen awards. It then provided

1 the synthesis quoted by Methanex before proceeding
2 to apply the Article 1105(1) standard to the facts
3 in its case.

4 Thus the Award's analysis of 1105(1),
5 taken as a whole, accepts the FTC interpretation
6 and incorporates the statements of other tribunals
7 which have accepted the FTC interpretation, as
8 well.

9 In applying that standard to the facts,
10 the waste management Tribunal also showed
11 appropriate respect for the presumption of
12 regularity in government action. Methanex ignores
13 that respect on the part of the waste management
14 Tribunal, and argues contrary to that presumption
15 of regularity.

16 Furthermore, the waste management Tribunal
17 found no violation of Article 1105(1) on the facts
18 before it. It considered that the government actor
19 there performed only part of its contractual
20 obligations because it was in a situation of
21 financial difficulty. The waste management

1 Tribunal likewise reasoned that although different
2 legal systems could have decided the claimant's
3 court claims differently, there had been no denial
4 of justice under international law.

5 Thus, the Award itself demonstrates that
6 the Article 1105 standard is not so loose as to
7 permit the kind of vague claims of unfairness that
8 Methanex makes here.

9 When fairly read, it is clear that the
10 waste management Tribunal considered the body of
11 Article 1105(1) law that has developed thus far in
12 order to find its relevance to the facts before it
13 in that case. That Tribunal in no way signaled
14 that a single paragraph of its analysis should from
15 now on be the governing formulation of the meaning
16 of international law's minimum standard.

17 In conclusion, the Tribunal should refuse
18 to consider Methanex's new claims under Article
19 1105(1) because they cannot be found anywhere in
20 its written pleadings, and the Tribunal should not
21 adopt Methanex's interpretation of Article

1 1105(1)'s minimum standard of treatment. Rather,
2 the Tribunal should apply the FTC interpretation,
3 confining the scope of Article 1105(1) to
4 recognized principles of customary international
5 law. Doing so leads to the inevitable dismissal of
6 Methanex's varied attempts to state a claim under
7 Article 1105(1).

8 Does the Tribunal have any questions?

9 ARBITRATOR REISMAN: I'm grateful to you
10 for elaborating the relevance of waste management
11 because I did read it, and I'm a little--I'm still
12 a bit confused. I had understood that Methanex was
13 arguing that waste management was authority for the
14 proposition that discriminatory treatment was part
15 of customary international law, and the position of
16 the United States was that customary international
17 law does not preclude a state from differentiating
18 between its national and an alien, customary
19 international law. I thought that was the
20 principle for which waste management was invoked.

21 And as far as I can see, waste management

1 does introduce the notion of discrimination as
2 customary international law because it's applying
3 the FTC and not assuming that the language of 1105
4 should be parsed to see if there is something in
5 addition to customary international law.

6 In addition to the paragraph that was
7 quoted by Methanex yesterday, which is paragraph
8 98, paragraph--and which makes specific reference
9 to discriminatory treatment, paragraph 97, as part
10 of the review, also cites to the Loewen
11 arbitration, and it says, after the quotation, The
12 Loewen Tribunal also noted that discriminatory
13 violations of municipal law would amount to a
14 manifest injustice according to international law.

15 Customary international law is something
16 that evolves. And is the Tribunal presented here
17 an evolution that it has to take account of?

18 MS. GUYMON: To answer the last part, yes.
19 The Tribunal should take account of at least the
20 evolution to the point in time at which the NAFTA
21 was implemented. It should not go back to some

1 ancient notion of fair and equitable treatment.

2 The United States has stated in other
3 contexts that it is an evolving standard. That is
4 not something that we deny, and so the Tribunal
5 should take into account that evolving aspect of
6 the standard.

7 But my understanding of the argument as
8 you mentioned, Professor Reisman, that Methanex was
9 making yesterday is that it was much broader than
10 just that waste management brought this principle
11 of discrimination into customary international law.
12 Methanex used these--I think it was you, Professor
13 Reisman, that referred to a list of horrors--these
14 various adjectives in paragraph 97 and simply said
15 that that's what happened here, that it was unfair,
16 it was unjust and idiosyncratic, and so forth, and
17 then, just in a very loose way, stated that that's
18 what happened here, that in favoring one competitor
19 over another and in accepting political
20 contributions and then making a policy decision
21 later that was affected allegedly by those

1 contributions, that was unfair and unjust and so
2 forth.

3 So, we understood the claim by Methanex
4 yesterday to be much broader than just using this
5 paragraph to bring discrimination into customary
6 international law.

7 The second thing I would like to say in
8 response to what you mentioned about Loewen is
9 Loewen was a case about denial of justice, and the
10 United States in its Amended Statement of Defense
11 recognized that there are certain contexts in which
12 a principle of discrimination has been recognized
13 in customary international law, and we, unlike
14 Methanex, identified some of those contexts.
15 Expropriation is a clear example. Denial of
16 justice is also an example we pointed out where
17 discrimination in that context of denying an alien
18 access to courts and judicial relief that are
19 allowed for its own residents, its own nationals,
20 is a recognized principle of nondiscrimination that
21 exists in customary international law.

1 So, the United States does not argue that
2 there is no principle of nondiscrimination.
3 Rather, the United States argues that that
4 principle exists in certain contexts, and none of
5 those contexts has been shown to exist in the case
6 before this Tribunal.

7 PRESIDENT VEEDER: We have a minor
8 administrative problem in that we had the relevant
9 pages that's paragraph 97 to 100 given to us by
10 Mr. Dugan in his opening statement materials at Tab
11 67, but the reference in our legal materials to the
12 full waste management award seems to be defective.
13 If you have the reference or Mr. Dugan has the
14 right reference, it might be useful if you give it
15 to us now or at a later stage this evening.

16 MS. GUYMON: I can give you the ICSID case
17 number.

18 PRESIDENT VEEDER: No, we want it in the
19 record.

20 MS. GUYMON: Oh, you want where it is in
21 the record.

1 PRESIDENT VEEDER: We've got a copy of it,
2 obviously, from Web site of ICSID.

3 MS. GUYMON: It was first, I think,
4 referred to by Mr. Dugan in his opening submission.

5 PRESIDENT VEEDER: I don't think so. I
6 think it was referred to before in a document that
7 was, in fact, given to us a few weeks ago, but that
8 may be wrong.

9 Mr. Dugan, can you help us?

10 MR. DUGAN: If you give us two minutes,
11 we'll give you the citation to the record.

12 PRESIDENT VEEDER: You can have more than
13 two minutes.

14 Thank you for your contribution, but we
15 have no further questions at this stage.

16 MR. LEGUM: If it could expedite things,
17 if the Tribunal already has a copy of the Award,
18 we, of course, have no objection to considering it
19 as part of the record, even if it's not formally--

20 PRESIDENT VEEDER: The problem is only one
21 of us has a copy of the Award, and it might be

1 useful if there was more than one. If it's not in
2 the record, we'll certainly--we do each have
3 records elsewhere--I'm sorry, we do each have a
4 copy of this Award elsewhere, but if it's in the
5 record we would just like the citation. At the
6 moment it looks as though the index is not correct
7 as regards a particular citation they are given.
8 But we will come back to this.

9 Could we just correct what I indicated.
10 This didn't come from the ICSID Web site. This
11 came from the Web site of Mexico, but it's still
12 the waste management award.

13 MR. DUGAN: The citation is Methanex
14 Evidentiary Motion tab 25.

15 PRESIDENT VEEDER: If you look there and
16 you can find it, you will win a special prize. We
17 couldn't find it in that reference.

18 MR. DUGAN: You couldn't find it in that
19 reference. Let me go back to my colleagues.

20 (Pause.)

21 PRESIDENT VEEDER: Let's continue.

1 MS. MENAKER: Mr. President, members of
2 the Tribunal, I will now address Methanex's
3 expropriation claim. Methanex did not spend much
4 time in its closing yesterday addressing its
5 expropriation claim. My response will, therefore,
6 be very brief.

7 In our opening statement, we demonstrated
8 that Methanex has not come even close to proving an
9 expropriation. We showed that Methanex had not
10 proven that Methanex-Fortier, Methanex-US, or any
11 asset of either of those enterprises had been
12 expropriated. We also demonstrated that
13 California's ban on MTBE in gasoline cannot be
14 considered expropriatory. Methanex has not refuted
15 any of this.

16 Yesterday, Methanex cited language from
17 the Metalclad decision, and claimed that it had met
18 the standard for expropriation enunciated by that
19 Tribunal because its market share in California
20 allegedly had been expropriated. The United
21 States, however, has demonstrated in its written

1 submissions and in oral argument that only property
2 can be the subject of an expropriation. The
3 excerpt for Metalclad cited by Methanex confirms
4 this point. It refers only to property. It is of
5 no assistance to Methanex, we submit.

6 We have also demonstrated that market
7 share is not a property right, that it's capable,
8 by itself, of being expropriated. And I would
9 refer the Tribunal specifically to the decision of
10 the Permanent Court of International Justice in
11 Oscar Chin case. That case and other authorities
12 on this topic are addressed this paragraphs 392 to
13 395 of our Amended Statement of Defense.

14 Nor has Methanex given any answer to the
15 United States's observation that it has submitted
16 no evidence of its market share in California to
17 begin with, and no evidence that that market share
18 has been taken away from it. This failure of proof
19 is fatal to Methanex's expropriation claim.

20 And unless the Tribunal has any questions
21 on Methanex's expropriation claim, we would rest on

1 our written and oral submissions to date.

2 PRESIDENT VEEDER: We have no questions at
3 this stage. Thank you, Ms. Menaker.

4 MS. TOOLE: Mr. President, members of the
5 Tribunal, it's a pleasure to appear before you
6 again today. As in our opening statement, I will
7 address Methanex's failure to provide evidence of
8 its ownership of Methanex-US and Methanex-Fortier.

9 I will begin by answering Mr. Rowley's
10 question to my colleague, Mr. McNeill. Mr. McNeill
11 brought to the Tribunal's attention the AVCO case,
12 where the Tribunal in that case found that
13 statements of corporate officers without any
14 contemporaneous evidence were insufficient to
15 satisfy the claimant's burden of proof regarding
16 its damages. You asked, Mr. Rowley, whether that
17 principle would apply to the issue of proof of
18 ownership. The answer is yes.

19 The issue is broader than what is
20 sufficient to prove damages or what is sufficient
21 to prove ownership. The issue is what serves as

1 competent evidence, period. The AVCO case clearly
2 shows that witness statements, uncorroborated with
3 any contemporaneous evidence, are not enough.

4 I will now turn to the specific issue of
5 ownership. Yesterday, Methanex stated that the
6 United States has no authority that entitles it to
7 evidence as authoritative as that necessary in a
8 corporate transaction. But, in essence, Methanex
9 is asking the United States for a 970 million
10 dollar check for its businesses, and it provides no
11 authoritative evidence of ownership of those
12 businesses. Our analogy last week to a corporate
13 transaction was appropriate. And it's simply not
14 true that the United States has no authority
15 regarding Methanex's burden of proof. Last
16 Wednesday, I referred the Tribunal to jurisprudence
17 on this very subject. Since those cases stand
18 un rebutted by Methanex, there is no need to repeat
19 them here. I will just refer the Tribunal to my
20 argument last Wednesday at pages 575 and 576 of the
21 transcript, and to our papers.

1 I also note that those cases are not the
2 only cases that speak to the issue of proof of
3 ownership. One may look generally to international
4 jurisprudence for examples of what constitutes
5 authoritative evidence of ownership. It is
6 Methanex, not the United States, that has provided
7 no authority on this point. Methanex has provided
8 no authority to support its contention that the
9 statement of a corporate officer and an
10 organizational chart constitute sufficient evidence
11 of proof of ownership.

12 So for the reasons highlighted today, as
13 well as the very important reasons of principle
14 that I discussed last week, we submit that the
15 Tribunal dismiss Methanex's claim for failure to
16 prove ownership of an investment in the United
17 States. And if the Tribunal has no further
18 questions, I will turn the floor to Mr. Bettauer.

19 PRESIDENT VEEDER: We would just like to
20 ask you for United States's position on
21 Mr. Macdonald's witness statements which stand as

1 evidence, and the effect on that evidence of the
2 United States not requiring him to be present at
3 this hearing to be cross-examined either by the
4 United States or by the Tribunal.

5 Now, first of all, if you have the IBA
6 Rules, we would like to hear you on Article 4, Rule
7 9, of the IBA Rules, and whether that has a
8 relevance to the present situation. I will read it
9 out.

10 MS. TOOLE: Okay.

11 PRESIDENT VEEDER: (Reading) If the
12 parties agree that a witness who has submitted a
13 witness statement does not need to appear for
14 testimony at an evidentiary hearing, such an
15 agreement shall not be considered to reflect an
16 agreement as to the correctness of the content of
17 the witness statement.

18 Now, I think that was part of the IBA
19 Rules. It was agreed to be applicable to the
20 parties. But is there here an agreement within the
21 meaning of Article 4, Rule 9, that Mr. Macdonald

1 does not need to appear for testimony at this
2 evidentiary hearing? And although the United
3 States, if there is such an agreement, wouldn't be
4 admitting the correctness as to the content of the
5 witness statement, what is the effect of not
6 cross-examining a witness in this situation?

7 MS. TOOLE: I guess Mr. Legum would like
8 to answer.

9 MR. LEGUM: With Ms. Toole's permission,
10 the United States addresses this issue in our
11 letter that's dated the date that the Tribunal
12 required us to identify the witnesses, which I
13 believe was May 10th, although I must say that the
14 dates are beginning to blur at this point. And the
15 position that we took there, and which we confirm
16 here, is that the parties agreed in the course of
17 their statements at the March 31st, 2003,
18 procedural hearing as to the procedure that would
19 be followed. And the parties agreed that witnesses
20 would need to be--would need to appear at the
21 hearing only in the event that the other party

1 sought to call them for cross-examination.

2 So, it is our position that there is,
3 indeed, an agreement within the meaning of
4 Article 4, paragraph 9 of the IBA Rules which are,
5 indeed, among the provisions that govern this
6 arbitration by the agreement of the parties.

7 Turning to the second question, we submit
8 that the United States's decision not to
9 cross-examine a witness does not in any way change
10 the value of the evidence offered by that witness.
11 In other words, if the evidence offered was
12 insufficient to carry Methanex's burden of proof
13 before the United States's decision not to call the
14 witness for cross-examination, it remains
15 insufficient for that purpose. And therefore, it's
16 our view that the decision not to call
17 Mr. Macdonald or any of the other witnesses
18 certainly cannot be viewed as increasing the value
19 of the evidence submitted by those witnesses.

20 ARBITRATOR ROWLEY: Mr. Legum, the AVCO
21 case, do you say we should take it to stand for the

1 proposition that Mr. Macdonald's evidence, in fact,
2 is no evidence?

3 MR. LEGUM: Evidence is evidence. I mean,
4 clearly it is evidence. It's simply not sufficient
5 to carry the burden of proof that Methanex has to
6 carry here.

7 The Tribunal's bifurcation order ordered
8 all issues in the case to be addressed in this
9 phase of the proceedings, save the quantum of
10 damages.

11 Mr. Macdonald's affidavit is all that
12 there is on that subject, and our submission is
13 that it is not sufficient.

14 MR. DUGAN: Again, I would like to object.
15 That's not all that there is. We offered a copy
16 from the annual report that was filed with the
17 Securities and Exchange Commission that fully
18 corroborates it. So, that's a misstatement of the
19 record.

20 PRESIDENT VEEDER: Thank you. Just one
21 further question directed to both of you. The

1 parties, the disputing parties, didn't agree that
2 the Tribunal should apply the whole of the IBA
3 Rules, as I recall, but I can't remember which bits
4 precisely were agreed and which were not agreed.
5 We take it that Article 4 was agreed to be applied,
6 and Article 3 and 5 as well?

7 MR. LEGUM: Yes. It is set forth in an
8 August 14, 2000, joint letter from the parties to
9 the Tribunal, and the agreement was for Articles 3,
10 4, and 5 to apply, with the exception of certain
11 provisions in Article 3, as I recall, concerning
12 the confidentiality of documents.

13 PRESIDENT VEEDER: Mr. Legum, can you
14 respond to the point just made by Mr. Dugan where
15 he submits that the evidence on this point is not
16 limited to Mr. Macdonald's affidavit.

17 MR. LEGUM: It's true that Methanex has
18 referred to two organizational charts, one that was
19 submitted with Mr. Macdonald's third affidavit, and
20 another that appears in an annual report. The two
21 organizational charts, however, are not consistent.

1 In one, it is represented that Methanex directly
2 owned Methanol-US (sic) which is contradicted by
3 Mr. Macdonald's statement in the organizational
4 chart that he submitted, and in the other--well,
5 that's the point that I essentially wanted to make.

6 PRESIDENT VEEDER: It's the latter
7 document something that's filed with the SEC which
8 carries certain penalties in regard to any
9 inaccuracy, which is perhaps the more significant
10 of those two documents. What do you say about the
11 point made yesterday by Mr. Dugan that a document
12 filed with the SEC, under severe penalties if it's
13 inaccurate, should carry more weight than
14 otherwise?

15 MR. LEGUM: Well, perhaps it should carry
16 somewhat more weight than an ordinary statement,
17 but there are many, many claims that are brought by
18 the SEC and by private parties that are based on
19 false statements in documents that are filed with
20 the SEC, and, in fact, the documents that are filed
21 with the SEC generally have to disclaim that the

1 SEC has not reviewed or proved the contents of
2 those, so it certainly adds somewhat to the weight
3 of the document, but it's not conclusive by any
4 means.

5 PRESIDENT VEEDER: Mr. Dugan, can you just
6 help us with the citation to the document, either
7 in your opening statement or in your statement
8 yesterday, just give us the tab number.

9 MR. DUGAN: It's 17 JS tab 78 at 1931.

10 PRESIDENT VEEDER: And where was it in
11 your opening statement bundle?

12 MR. DUGAN: I believe it was tab 36, 37,
13 and 38.

14 PRESIDENT VEEDER: Is that the right
15 reference? I'm looking at your opening statement
16 bundle.

17 MR. DUGAN: Closing statement bundle.

18 PRESIDENT VEEDER: Closing statement
19 bundle. Is it tab 38 in the closing bundle?

20 MR. LEGUM: We have it as tab 36.

21 And my colleagues have brought something

1 to my attention which I'd like to correct, which is
2 that the chart that's stated there is represented
3 as being the company's percentage of voting
4 interest beneficially owned or over which control
5 or direction is exercised. So, I think it can be
6 fairly read as encompassing indirectly owned
7 subsidiaries.

8 ARBITRATOR ROWLEY: Thus, no inconsistency
9 with the other chart?

10 MR. LEGUM: Yes. I think that it's not,
11 on its face with that amendment, inconsistent with
12 the chart. However, we would note how difficult
13 would it have been to submit authentic evidence of
14 the ownership of these companies such as the
15 corporate minute books and documents reflecting
16 share transfers?

17 Moreover, this was only referred to for
18 the first time yesterday.

19 (Pause.)

20 PRESIDENT VEEDER: Mr. Dugan, can you help
21 us. We are looking at the full document, the

1 annual report for 1999 in tab 78 of JS page 1861.

2 This annual report is filed with the SEC or was

3 filed with the SEC; is that right?

4 MR. DUGAN: That's correct.

5 PRESIDENT VEEDER: And it bears the

6 signature at the back of the General Counsel of

7 Methanex, looking at page 1945. Or is it some

8 other validation?

9 MR. LEGUM: If I may be of assistance.

10 PRESIDENT VEEDER: Yes.

11 MR. LEGUM: My understanding, and

12 obviously I did not draft the annual report, is

13 that this chart appears as part of essentially a

14 separate document that's included in with the

15 annual report, the annual information form which

16 begins on page JS 1930. What precedes that are the

17 consolidated financial statements, and you if look

18 at pages JS 1916 and 1917, that's where the

19 officers of Methanex vouched for the consolidated

20 financial statements, and then the auditors say

21 that they audited the consolidated statements of

1 income and retained earnings and cash flows, but
2 that's my reading of it, and I'm sure that Methanex
3 knows a lot more about how these things were
4 prepared than I do.

5 PRESIDENT VEEDER: Mr. Dugan, do you want
6 to add anything to what Mr. Legum has said?

7 MR. DUGAN: Sorry. There is a similar
8 chart for the annual report filed for the year 1998
9 and 1997. The one for 1998 is at volume 17, tab
10 77, at page 1830.

11 And the second thing is, I think we're
12 checking, but I think these annual reports may
13 actually have been offered by the United States in
14 evidence, but we will check on that.

15 ARBITRATOR ROWLEY: Mr. Dugan, are you
16 nodding that they were offered by the United
17 States?

18 MR. LEGUM: I couldn't profess to be
19 Mr. Dugan, but, indeed, this does appear in volume
20 17, which is a volume containing evidence that was
21 put in by the United States.

1 ARBITRATOR ROWLEY: It's the common
2 sharing of the letter "U" that put me off.

3 PRESIDENT VEEDER: Yes, let's continue.
4 Thank you very much, both of you.

5 MR. BETTAUER: Mr. President, we are well
6 on schedule. The U.S. team has now responded to
7 the arguments Methanex made in its closing
8 yesterday. We have shown that those arguments do
9 not carry, and we have shown that the arguments
10 made in our first-round presentation last Tuesday
11 and Wednesday compel dismissal.

12 Without repeating what our team has said
13 and what I said last week remains for me to make a
14 few additional points and to sum up the U.S.
15 presentation.

16 In the hearing on jurisdiction, Methanex
17 told this Tribunal that it could prove that
18 California intended to harm Methanex by banning
19 MTBE. The Tribunal summarized Methanex's
20 contentions in paragraph 157 of its First Partial
21 Award. Methanex had alleged that Governor Davis

1 considered methanol a foreign product, produced by
2 foreign producers, and that his intent was to harm
3 Methanex. In paragraph 158, the Tribunal explained
4 that sufficient credible evidence of this intent
5 would need to be adduced.

6 In paragraphs 172, 4, and 5, in the
7 dispositif, the Tribunal offered Methanex the
8 opportunity to provide evidence proving this intent
9 in a fresh pleading.

10 Here we are three years later and tens of
11 thousands of pages later. Where is the evidence
12 that Governor Davis considered methanol to be
13 foreign? Where is the evidence that Governor Davis
14 associated methanol with Methanex? Where is the
15 evidence that Governor Davis intended to harm
16 Methanex? There is no such evidence. There is no
17 evidence that Governor Davis or anyone else in
18 California gave any thought to methanol at all in
19 banning MTBE. There is no evidence that California
20 gave any thought at all to Methanex. There is not
21 a scrap of evidence to show that anyone in

1 California intended to harm Methanex by banning
2 MTBE.

3 Rather than prove intent to harm Methanex
4 or foreign producers, Methanex has offered this
5 Tribunal conspiratorial speculations about what
6 could have happened and asks to you draw inferences
7 based on those speculations. They offered
8 conjecture on conjecture, and put them forward as
9 if they were facts. They offered sound bites of
10 evidence, but this is not enough to sustain Chapter
11 11 jurisdiction. There has been a complete nail
12 your failure of proof. Methanex has not proved the
13 facts required to establish jurisdiction.

14 Last Monday, Methanex admitted that it had
15 no evidence of any corruption on the part of
16 Governor Davis. Yesterday, Methanex nonetheless
17 leveled some serious charges of corruption at
18 Governor Davis, based on opinion pieces published
19 on editorial pages of newspapers and
20 unsubstantiated inferences.

21 This Tribunal should have none of it.

1 There is no proof of corruption. There is no proof
2 of a bribe. There is no proof of any quid pro quo
3 for political contributions. The United States
4 system of government, like many others, allows for
5 private financing of political campaigns, and
6 nothing wrong can be inferred from that. The
7 Tribunal should not let these reckless charges of
8 wrongdoing stand.

9 To support its contention that it suffered
10 proximately caused loss, Methanex yesterday relied
11 on an entire single line from a textbook of U.S.
12 municipal tort law. Ignoring the dozens of
13 international authorities collected by the United
14 States does not make them go away, however. Those
15 authorities made clear that under international law
16 Methanex's claim must be dismissed. Moreover, the
17 record is silent when it comes to any evidence at
18 all, any evidence at all, of actual loss suffered
19 by Methanex as a result of the MTBE ban.

20 Methanex has also not proved the facts
21 required to establish any violation of a

1 substantive provision of the NAFTA. As we have
2 reviewed for you, Methanex concedes that it
3 received the same treatment as U.S.-owned methanol
4 producers and marketers. Its national treatment
5 claim under Article 1102 cannot survive.

6 Nor has it shown that its investments in
7 the United States, if, indeed, it had proved it had
8 any, received any treatment not in accord with the
9 international law--with the international law of
10 minimum standard of treatment which would be
11 necessary to establish an 1105(1) claim.

12 Nor has it shown that it had any property
13 expropriated, which would be necessary to establish
14 an 1110 claim.

15 This has been a spectacular failure of
16 proof across the board on every point, but it has
17 been more than that. This is a case where the
18 claimant's factual assertions have changed from day
19 to day. This is a case where the sworn affidavits
20 and witness statements proffered by the claimant
21 have been shown inaccurate time and time again

1 often in a matter of hours after submittal. This
2 is a case where the claimant has contorted the
3 evidence and the testimony sometimes to the extent
4 of asserting statements contrary to what witnesses
5 actually said. This is a case where legal theories
6 proffered by the claimant have changed, not at
7 different stages of the briefing as sometimes
8 happens, but day to day and hour to hour, sometimes
9 within the course of a single presentation.

10 This is a case that has seen leaps of
11 logic that have no basis and theories of
12 international law invented for this occasion. This
13 is a case where the claimant made a legal argument
14 to the Tribunal and then immediately turned around
15 and said that its own argument was a red herring.

16 Methanex has no compunction about telling
17 its shareholders one thing and telling this
18 Tribunal something else. Methanex has no
19 compunction about telling the Tribunal and the
20 United States one thing one day and something else
21 the next day. And as we know from the last few

1 days, this is a case where the claimant sought to
2 proceed on the basis of evidence that was, under
3 the best reading, procured by dubious and unsavory
4 methods, methods that the United States showed were
5 illegal, methods that leave the law firm for
6 purporting to approved them too embarrassed to have
7 itself identified.

8 Mr. President, members of the Tribunal, it
9 is hard to believe this is a serious case. We have
10 seen shifting sands of Methanex's representation of
11 fact and law, its underhanded collection of
12 documents, and the discrediting of affidavits it
13 submitted. These are not the kind of practices
14 that should be tolerated under Chapter 11 of the
15 NAFTA or anywhere in arbitration proceedings.

16 Last Wednesday, I explained why an award
17 of costs in this case is justified, and refer the
18 Tribunal to the argument in the U.S. Amended
19 Statement of Defense on the point. Methanex's
20 conduct during this hearing and what has come out
21 during the hearing further justify an award of full

1 costs. This case not only has no merit, there was
2 no basis for bringing it in the first place.
3 Methanex did not have the facts to support it and
4 cannot conceivably fit it under any reasonable
5 reading of the NAFTA. And if this wasn't clear
6 from the outset, as the United States thinks it
7 was, it was abundantly clear after the First
8 Partial Award.

9 This case is so completely without
10 substance that none of the NAFTA parties should
11 ever again be called upon to expend significant
12 resources defending against such a case. That is
13 why it is particularly important that this Tribunal
14 award full costs in this case to the United States.

15 Mr. President, you said yesterday that the
16 Tribunal would wish documentation of costs of each
17 party. The United States will stand ready to
18 provide the Tribunal with appropriate documentation
19 of its costs.

20 Mr. President, members of the Tribunal,
21 based on the arguments and evidence in the U.S.

1 written and oral submissions in this case, the
2 United States asks the Tribunal dismiss all of
3 Methanex's claims and award full costs to the
4 United States.

5 With that said, I would like to make one
6 further observation, and this observation deals
7 with our NAFTA arbitration team. This will be the
8 last hearing with Mr. Legum as head of that team.
9 He has done an amazing job on behalf of the United
10 States, and I wish to put on record our
11 appreciation and deep affection for him.

12 I would like to ask you, Mr. President, to
13 give Mr. Legum the floor to say a few final words
14 and close the presentation of the United States at
15 this hearing. Thank you.

16 PRESIDENT VEEDER: Thank you. Of course,
17 we give the floor to Mr. Legum.

18 MR. LEGUM: I would just like to say
19 personally and on behalf of my team that it has
20 been a true privilege to appear before you for
21 these past four years in connection with this case,

1 and we thank you for your patience and your
2 courtesy in listening to us. Thank you very much.

3 PRESIDENT VEEDER: Well, thank you, Mr.
4 Legum. I think we say "au revoir" and not
5 "adieux."

6 Could we just go to some of the
7 housekeeping matters the Tribunal raised last
8 night, and dealing with costs, we understand the
9 United States would be responding to our invitation
10 to put in written submissions about the
11 quantification of costs. We haven't heard you,
12 Mr. Dugan, but would you be willing to do the same,
13 and have you discussed it all between the parties
14 as to what the timetable for this exchange might
15 be?

16 MR. DUGAN: No, we haven't discussed at
17 all at least between the parties. I guess our
18 position would be that it's premature at this stage
19 to discuss costs until there is a decision by the
20 Tribunal.

21 PRESIDENT VEEDER: Well, that may be so,

1 but nonetheless, the Tribunal would like the
2 parties to put in written submissions.

3 MR. DUGAN: Then we will do so.

4 PRESIDENT VEEDER: Now, what time scale
5 can you do it? Can you do it within the next two
6 weeks?

7 MR. DUGAN: Yes, we can. I mean, when you
8 say a submission on costs, precisely what are you
9 looking for?

10 PRESIDENT VEEDER: You both made
11 submissions on costs. You both asked for costs
12 depending on the result in which this case will be
13 decided by the Tribunal. But we are really looking
14 at the quantum of those costs as to what you
15 envisage. Now, we reserve the right not to decide
16 the question of costs or to come back to you, but
17 we would like some idea of what the quantum is on
18 both sides that you envisage being the subject
19 matter of your respective applications.

20 MR. DUGAN: We'll certainly do so.

21 PRESIDENT VEEDER: And obviously we would

1 like each of to you have the right to comment on
2 the other's written submissions within, say, two
3 weeks thereafter.

4 MR. BETTAUER: The two-week comment period
5 sounds fine, but we would actually prefer to have a
6 month to put together the cost submission given
7 that we have to collect information beyond our
8 particular legal office to do that.

9 PRESIDENT VEEDER: If we said 30 days for
10 both sides to put in their initial written
11 submissions on quantum of costs, would that be
12 acceptable?

13 MR. DUGAN: That's fine.

14 PRESIDENT VEEDER: And then to respond, do
15 you need another 30 days?

16 MR. BETTAUER: Two weeks.

17 PRESIDENT VEEDER: Two weeks. So, 30 days
18 for the first round, two weeks--and as I say, we
19 may come back to you, we may not come back to you,
20 but we want to have the full material.

21 Now, that's costs.

1 MR. LEGUM: Before you move on, just so
2 the record is clear, we are only talking about
3 quantification of costs. The Quantum.

4 PRESIDENT VEEDER: Yes, you both made your
5 submissions on the merits of the decision one way
6 or the other. We are talking about quantum.

7 MR. LEGUM: Thank you.

8 PRESIDENT VEEDER: The other matter we've
9 got to address is that we anticipate that Canada or
10 Mexico may, within a very short time, if they do it
11 at all, wish to put in further written submissions.
12 We will establish the time scale they have in mind
13 separately, but obviously if that takes place, we
14 would like to give an opportunity to both disputing
15 parties to respond to those written submissions.
16 We are not talking about evidence. Simply talking
17 about a limited legal argument.

18 But assume that Canada and Mexico were to
19 do that within the next two weeks. Mr. Dugan, do
20 you have any particular feeling for how long you
21 might need on your side to respond?

1 MR. DUGAN: Three weeks.

2 PRESIDENT VEEDER: Three weeks. Could the
3 United States do that as well?

4 MR. LEGUM: Three weeks is fine.

5 PRESIDENT VEEDER: Now, we raise the
6 proposal that the parties should try and agree,
7 important, not minor, but important corrections to
8 the transcript of this hearing, and to do so in an
9 agreed form within a certain period of time. Has
10 that been discussed between the parties at all?

11 MR. DUGAN: No, that hasn't been
12 discussed.

13 PRESIDENT VEEDER: Mr. Dugan, how do you
14 see this going forward?

15 MR. DUGAN: I think that we could commit
16 to mark up the transcript and provide it to them,
17 say, in 10 days, and actually we could just
18 exchange proposed changes and then comment on each
19 other's and try to come up with an agreed--an
20 agreed set of changes.

21 PRESIDENT VEEDER: It's in our experience

1 slightly more useful to do it more quickly because
2 things fade quite fast. We can recognize now what
3 we see as important potential corrections. We
4 would invite you, Mr. Dugan, if you possibly could
5 on your side to do it more quickly, as shall the
6 United States as well.

7 MR. DUGAN: Seven days.

8 PRESIDENT VEEDER: We are negotiating down
9 from seven to five. Can you do it by the end of
10 next week?

11 MR. DUGAN: By the end of next week,
12 certainly, that's fine. End of next week is fine.

13 PRESIDENT VEEDER: And the United States?

14 MR. LEGUM: That's fine.

15 PRESIDENT VEEDER: So, by next Friday, if
16 you could exchange, and obviously try and agree as
17 far as you can. And if you want to highlight where
18 you don't agree, it will mean that the Secretary of
19 the tribunal will listen to the tape over eight
20 full days in realtime. So, for his sake, if you
21 could try and agree where you can agree, it would

1 be a good thing.

2 We look forward to getting a document from
3 you, not next week, but towards the early part of
4 the following week, in an agreed format, indicating
5 where it's not agreed.

6 A very minor matter, but it may be
7 important, we haven't ruled on the United States's
8 objection to the exhibits attached to Methanex's
9 submissions in response to the amici submissions.
10 What we would now do is to invite the United
11 States, if it wanted to, to comment on these three
12 exhibits, these are tabs 3, 13, and 14 of volume
13 one of the exhibits to the claimant's amici
14 submissions on the assumption that we would be
15 admitting these materials. As I say, we haven't
16 made a decision about this. We have your
17 respective arguments. But assuming we let it in,
18 the question now is does the United States have
19 anything further to say on those three tabs?

20 MR. LEGUM: Could we have just one moment.

21 (Pause.)

1 MR. LEGUM: I think we have nothing
2 further to say on that subject.

3 PRESIDENT VEEDER: Thank you. We have
4 something with which we would like to conclude, but
5 subject to that, is there anything that either side
6 would like to raise? Mr. Dugan.

7 MR. DUGAN: Yesterday, in my closing I did
8 attempt to reserve the right. I would like the
9 opportunity to respond to the points--to the
10 government's response to the points that I made
11 yesterday, which is specifically why did Governor
12 Davis select only ethanol as an oxygenate that he
13 would subject to testing in California. There was
14 a partial response today, but not a full one. The
15 United States focused on the statements by
16 Mr. Kenny in Congress, but our principal point was
17 when Governor Davis signed the Executive Order in
18 March of 1999, he selected ethanol and only ethanol
19 for evaluation as a replacement for MTBE.

20 Now, the U.S. response today was--dealt
21 with Mr. Kenny and not Governor Davis. That was

1 the crucial factor. Why did Governor Davis select
2 that? And they had no answer to that.

3 Now, secondly, this idea that ethanol was
4 the only possible alternative--

5 MS. MENAKER: Excuse me, Mr. President,
6 can you please first rule on whether it's
7 appropriate for Methanex to give its surreply
8 rather than having Methanex give its argument right
9 now?

10 PRESIDENT VEEDER: We're not looking for
11 argument, but I think Mr. Dugan is making an
12 application for very limited posthearing brief, as
13 we hear him.

14 MR. DUGAN: No, no, we can just do it
15 right here. I mean, I'm willing to--it's very
16 short the way I want to address it.

17 PRESIDENT VEEDER: I'm sorry, we
18 misunderstood. How short is short?

19 MR. DUGAN: One more minute.

20 PRESIDENT VEEDER: One more minute?

21 MR. DUGAN: One more minute.

1 PRESIDENT VEEDER: After four years, we
2 are sympathetic to Mr. Dugan. Do you press your
3 objection, Ms. Menaker?

4 MS. MENAKER: I don't. I just--I will
5 rely on the record and, of course, I'm sure you
6 will be reading the transcript and seeing what our
7 response is to what is inevitably Methanex's
8 response now. Thank you.

9 MR. BETTAUER: Of course we may wish to
10 reply.

11 PRESIDENT VEEDER: You may. After four
12 years, you also have the right to reply with the
13 further minute. Mr. Dugan, this minute is yours.

14 MR. DUGAN: Thank you. So, the first
15 point is that there has been no response on why
16 Governor Davis acted the way he did.

17 And secondly, the suggestion that it was
18 clear that ethanol was the only alternative is
19 contradicted conclusively by Senate Bill 521
20 itself, which ordered the University of California
21 to evaluate at least two other oxygenates, ETBE and

1 TAME. So, there were named oxygenates that the
2 University of California was supposed to evaluate.

3 Now, it might not have had enough data to
4 do that, but that's precisely what the evaluation
5 process was meant to do, to find data and to
6 evaluate which one of these would be the best.

7 Now, Governor Davis ignored SB521. He
8 ignored all the other potential oxygenates that
9 were available, and, instead, he selected one to
10 evaluate. The United States has proffered no
11 evidence of why that selection of only one was
12 made, and we submit that the reason is obvious.

13 PRESIDENT VEEDER: Does United States
14 require one minute to respond?

15 MS. MENAKER: I would like one minute, if
16 that's okay with the Tribunal.

17 PRESIDENT VEEDER: Ms. Menaker, you have
18 one minute.

19 MS. MENAKER: Thank you. We submit that
20 there is, indeed, evidence in the record to support
21 the justification for why Governor Davis ordered a

1 study on ethanol and not on every other possible
2 oxygenate. Today in my argument I cited to four
3 places in the record. Two were affidavits
4 submitted by Mr. Macdonald that recognized that the
5 only two oxygenates that have ever been used in any
6 significant amount in the United States were MTBE
7 and ethanol. I also cited to Dean Simeroth's
8 statement where he made that same comment that is
9 also in Dean Simeroth's testimony, as well as to
10 the statement of Bruce Burke.

11 This was a well-known fact, and therefore,
12 it is not surprising, in our view, that Governor
13 Davis would first and foremost look to do a study
14 on ethanol, since that would be the oxygenate that
15 would be the only other feasible alternative to
16 MTBE. Thank you.

17 PRESIDENT VEEDER: Thank you, Ms. Menaker.

18 Mr. Dugan, do you have any other
19 applications to make before we close the hearing?

20 MR. DUGAN: No, none other.

21 PRESIDENT VEEDER: And the United States?

1 Perhaps I could ask Mr. Legum for the last time?

2 MR. LEGUM: Only a request for an order
3 formally closing the proceedings under
4 Article 29(1).

5 PRESIDENT VEEDER: Subject to receiving
6 the further written submissions on the quantum of
7 the parties' respective costs, we close the hearing
8 pursuant to Article 29 1) of the UNCITRAL Rules.
9 But in accordance with Article 29(2), the Tribunal
10 reserves the right to make further requests of the
11 parties for assistance, and obviously we are
12 dealing with this stage of the arbitration. The
13 jurisdiction and liability issues which were the
14 subject of our order last summer.

15 MR. DUGAN: Just one point. You asked
16 yesterday for us to send to you, and obviously to
17 the United States, a copy of the iterations of the
18 CaRFG3 regulations, and that's in the propose, and
19 we will try to get that to you tomorrow or Monday.
20 Just to make sure that's still acceptable.

21 PRESIDENT VEEDER: That's more than

1 acceptable. That material we understand is already
2 in the record. It just has to be reorganized in a
3 more useful form for our deliberations.

4 MR. DUGAN: We'll get them to you as soon
5 as we can.

6 PRESIDENT VEEDER: Thank you very much.

7 Well, ladies and gentlemen, we have now
8 come to the end of a difficult hearing in a
9 complicated case. And we thank all counsel on both
10 sides for their most able, professional, and
11 courteous presentation of the disputing parties'
12 arguments. But behind the table and behind the
13 scenes we also know that many others have performed
14 sterling service in preparing and collating the
15 materials we have seen. And we thank also these
16 invaluable ELMO and PowerPoint operators, legal
17 assistants, paralegal, secretaries, photocopyists,
18 hole punchers and stapling specialists. These are
19 the unsung heroes and heroines of every arbitration
20 hearing. We recognize their efforts in this case
21 more than ever.

1 We have also to thank certain others, on
2 behalf of the Tribunal, and we are sure here also
3 on behalf of the disputing parties. We recognize
4 the miraculous efforts by the Court Reporters in
5 transcribing our several contributions, some more
6 audibly challenging than others, and these
7 individuals we would like to name in person: David
8 Kasdan, Randy Salzman, Johanna Marshall, and Cathy
9 Jardim.

10 We thank also the superefficient technical
11 efforts of the audiovisual technicians. There are
12 nine of them: Pio Bazzacco, Clovis Fantinelli,
13 Sefik Cardak, Luiz Aljmeida, Oscar Plazas, Francis
14 Peng, Tery Halt, and Cuneyt Sandikei.

15 We also thank the World Bank security
16 operations and its catering services.

17 And lastly, but far from least, we thank
18 ICSID for their hospitality and efficiency to a
19 NAFTA arbitration, from the omnipresent Mr. Singh
20 to our indefatigable Administrative Secretary,
21 Ms. Stevens.

1 And on that note, we close this hearing.

2 Thank you all very much.

3 (Whereupon, at 6:43 p.m., the hearing was
4 adjourned.)

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

1 CERTIFICATE OF REPORTER

2

3 I, David A. Kasdan, RMR-CRR, Court
4 Reporter, do hereby testify that the foregoing
5 proceedings were stenographically recorded by me
6 and thereafter reduced to typewritten form by
7 computer-assisted transcription under my direction
8 and supervision; and that the foregoing transcript
9 is a true record and accurate record of the
10 proceedings.

11 I further certify that I am neither
12 counsel for, related to, nor employed by any of the
13 parties to this action in this proceeding, nor
14 financially or otherwise interested in the outcome
15 of this litigation.

16

17 DAVID A. KASDAN

18

19

20

21

